(9)

No. 05-9264
Title: Alphonso James, Jr., Petitioner
v.
United States
Docketed: February 16, 2006
Lower Ct: United States Court of Appeals for the Eleventh Circuit
Case Nos.: (04-12915)
Decision Date: November 17, 2005
Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Feb 14 2006	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due March 20, 2006)
Feb 23 2006	Waiver of right of respondent United States to respond filed.
Mar 2 2006	DISTRIBUTED for Conference of March 17, 2006.
Mar 8 2006	Response Requested . (Due April 7, 2006)
Mar 29 2006	Order extending time to file response to petition to and including May 8, 2006.
May 8 2006	Brief of respondent United States in opposition filed.
May 18 2006	Reply of petitioner Alphonso James, Jr. filed.
May 24 2006	DISTRIBUTED for Conference of June 8, 2006.
Jun 12 2006	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED limited to Question 2 presented by the petition.
Jul 26 2006	Extension of time within which to file the joint appendix and petitioner's brief on the merits to and including August 17, 2006.
Aug 14 2006	SET FOR ARGUMENT on Tuesday, November 7, 2006.
Aug 17 2006	Joint appendix filed.
Aug 17 2006	Brief of petitioner Alphonso James, Jr. filed.
Sep 6 2006	Extension of time within which to file respondent's brief on the merits to and including September 28, 2006.
Sep 13 2006	CIRCULATED.
Sep 28 2006	Brief of respondent United States filed. (Distributed)
Oct 6 2006	Record received from U.S.C.A. for 11th Circuit. (1 envelope)
Oct 23 2006	Letter received from the Solicitor General. (Distributed).
Oct 26 2006	Record received from U.S.D.C. for Middle District of Florida.
Oct 30 2006	Reply of petitioner Alphonso James, Jr. filed. (Distributed)

05-9264

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2005

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ORIGINAL

ALPHONSO JAMES, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The Petitioner, Alphonso James, Jr., asks leave to file the enclosed Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit without prepayment of costs and to proceed *in forma pauperis* in accordance with Supreme Court Rule 39, and Title 18, U.S.C. § 3006A(d)(6). The filing of this petition is a continuation of the representation of the defendant under a Criminal Justice Act appointment of the Office of the Federal Public Defender for the Middle District of Florida, by the United States District Court for the Middle District of

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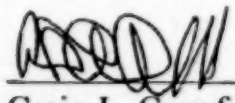
Florida. In accordance with § 3006A(d)(6), no affidavit as required by Supreme Court Rule 39, need be filed.

WHEREFORE, Petitioner, ALPHONSO JAMES, JR., prays for leave to proceed *in forma pauperis*.

RESPECTFULLY SUBMITTED this **14th day of February 2006**.

R. Fletcher Peacock
Federal Public Defender



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QUESTIONS PRESENTED

Issue I

Whether the Eleventh Circuit erred by holding that a state drug conviction, which did not necessarily involve manufacturing, distributing, or possessing with intent to manufacture or distribute, qualified as a serious drug offense under 18 U.S.C. § 924(e), in violation of *Taylor v. United States*, 495 U.S. 575 (1990), and *Shepard v. United States*, 544 U.S. 13 (2005).

Issue II

Whether the Eleventh Circuit erred by holding that all convictions in Florida for attempted burglary qualify as a violent felony under 18 U.S.C. § 924(e), creating a circuit conflict on the issue.

Issue III

Whether the felon-in-possession statute, 18 U.S.C. § 922(g), is facially invalid because Congress failed to define commerce as interstate or foreign commerce. Additionally, whether the statute is unconstitutional because Congress acted beyond the power of the commerce clause by failing to require a substantial nexus.

LIST OF PARTIES

The parties to the judgment from which review is sought are Petitioner Alphonso James, Jr., and the United States of America, Respondent.

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OPINION BELOW

In a published opinion issued on November 17, 2005, the United States Court of Appeals for the Eleventh Circuit vacated and remanded the sentence imposed by the United States District Court for the Middle District of Florida. *See United States v. James*, 430 F.3d 1150 (11th Cir. 2005)(attached as Appendix A).

GROUNDS FOR JURISDICTION

The United States District Court for the Middle District of Florida had original jurisdiction over this criminal action pursuant to 18 U.S.C. § 3231. An appeal, by the government, and a cross appeal, by Mr. James, from that court's final judgment proceeded for review by the United States Court of Appeals for the Eleventh Circuit, in accordance with 18 U.S.C. § 3742 and 28 U.S.C. § 1291. On November 17, 2005, the Eleventh Circuit vacated and remanded the sentence imposed by the district court but dismissed and/or affirmed the district court's decision as to Mr. James' cross appeal.

Jurisdiction to entertain this appeal is invoked by the timely filing of this petition within the prescribed 90 days after entry of the judgment. *See* 28 U.S.C. § 1254(1); S. Ct. R. 13.1.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. CONST. amend. X:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people

U.S. CONST., ART. I, § 8, 18 U.S.C. § 922, and **18 U.S.C. § 924** are reprinted in their entirety in Appendices B, C, and D, respectively.

STATEMENT OF THE CASE

Material Facts

Mr. James has been convicted of the following felony offenses: (a) attempted burglary of a dwelling in violation of Florida Statutes, §§ 810.02 and 777.04, on June 3, 1997; (b) possession of cocaine in violation of Florida Statutes, § 893.13 and trafficking in illegal drugs in violation of Florida Statutes, § 893.135, on January 28, 1998; and (c) trafficking possession in cocaine in violation of Florida Statutes, § 893.135, on June 29, 1998.

On January 31, 2003, Mr. James was found in possession of an F.E.G., Model Mark II APK, .380 caliber semi-automatic pistol and Remington .380 caliber ammunition in Fort Myers, Florida. Both the gun and bullets were manufactured outside the State of Florida.

At sentencing, Mr. James argued that he was not subject to an enhanced sentence under the Armed Career Criminal Act (ACCA) because he only had one countable conviction. Specifically, Mr. James argued that his attempted burglary conviction was not a prior violent felony under § 924(e)(2)(B). Further, he argued that his conviction for possession of over 200 grams but less than 400 grams of cocaine was not a serious drug offense under § 924(e)(2)(A). The government argued that both of these convictions satisfied the requirements under § 924(e).

The district court held that Mr. James' attempted burglary conviction was a violent felony under § 924(e)(2)(B). However, the district court held that Mr. James' conviction for possession of between 200 and 400 grams of cocaine (trafficking possession) was not a serious drug offense under § 924(e)(2)(A). Specifically, the district court found:

> [B]ased upon the circumstances set forth in the information, this case **does not involve**, as far as we know, the manufacturing, distributing or possessing with intent to manufacture or distribute cocaine; and the Court finds, therefore, that this is not a serious drug offense within the meaning of Section 924(e).

(Doc 68 - Pg 63)(emphasis added).

Based on the district court's rulings, Mr. James did not qualify as an armed career criminal because he only had two, instead of the requisite three, prior qualifying convictions.

The government appealed the district court's ruling as to the trafficking possession conviction. Mr. James cross appealed the district court's ruling as to the attempted burglary. The Eleventh Circuit held that Mr. James convictions for trafficking possession of cocaine and attempted burglary both qualified under 18 U.S.C. § 924(e) as predicate offenses. *See James*, 430 F.3d at 1156-1157.

Basis for Federal Jurisdiction

By an indictment filed June 25, 2003, the government charged Alphonso James, Jr., with possession of a firearm by a convicted felon. On January 13, 2004, Mr. James pled guilty as charged.

At sentencing, the district court questioned whether two prior convictions would subject Mr. James to be sentenced under 18 U.S.C. § 924(e).[1] As to the prior conviction for attempted burglary, the district court ruled that the conviction counted under § 924(e). As to the prior conviction for trafficking possession in cocaine, the district court found that, under Florida law, trafficking possession in cocaine did not involve any intent to manufacture or distribute. As such, the district court held that Mr. James' conviction for trafficking possession in cocaine did not count as a serious

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[1] One previous conviction for a serious drug offense was not contested.

drug offense. Based on the district court's analysis, Mr. James only had two qualifying prior convictions under § 924(e), and thus, the district court sentenced Mr. James under § 924(a)(2) to 71 months' imprisonment, to be followed by a three-year term of supervised release.

The government appealed. Mr. James filed a cross appeal.

On appeal, the government argued that Mr. James' conviction for trafficking possession of cocaine qualified as a serious drug offense. On cross appeal, Mr. James argued that his conviction for attempted burglary was not a qualifying offense under the statute, that 18 U.S.C. § 922(g) was unconstitutional, and that the district court did not err in finding that Mr. James' conviction for trafficking possession in cocaine was not a serious drug offense. On November 17, 2006, the Eleventh Circuit held that Mr. James' conviction for trafficking possession of cocaine was a serious drug offense, that his conviction for attempted burglary was a violent felony, and that the constitutional challenge to the statute was not considered because it was not raised in the district court. *See James*, 430 F.3d at 1153 n.1, 1156-1157.

This petition follows.

REASONS FOR GRANTING THE WRIT

Issue I

The Eleventh Circuit erred by holding that a state drug conviction, which did not necessarily involve manufacturing, distributing, or possessing with intent to manufacture or distribute, qualified as a serious drug offense under 18 U.S.C. § 924(e), in violation of *Taylor v. United States*, 495 U.S. 575 (1990), and *Shepard v. United States*, 544 U.S. 13 (2005).

The Eleventh Circuit held that Mr. James' conviction in Florida for possession of between 200 and 400 grams of cocaine was a serious drug offense under 18 U.S.C. § 924(e). *See James*, 430 F.3d at 1156. Mr. James submits that the Eleventh Circuit erred in its decision.

The ACCA provides a mandatory sentence for a person who violates § 922(g) and has three prior convictions for a violent felony or serious drug offense, or both. *See* 18 U.S.C. § 924(e). The statute defines a serious drug offense as:

> (ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance . . ., for which a maximum term of imprisonment of ten years or more is prescribed by law.

18 U.S.C. § 924(e)(2)(A). The definition of a qualifying state offense under the ACCA is a matter of federal law. *See Taylor v. United States*, 495 U.S. 575, 590-591 (1990). This Court further stated that in deciding whether a crime is a serious drug offense, sentencing courts should look to the statutory definition of the crime charged, rather than the actual facts of the individual's prior conviction. *Id.* at 600-602. This categorical approach, which is consistent with the statutory language as

well as the legislative history of the ACCA, is designed to avoid "the practical difficulties and potential unfairness of a factual approach" to each prior conviction. *Id.* at 601. Furthermore, this Court has restricted the type of documents the sentencing court can consider in determining whether a conviction is a qualifying offense. *See Shepard v. United States,* 544 U.S. 13, ___, 125 S. Ct. 1254, 1263 (2005)(rejecting the government's contention that police reports could be used, this Court held that the inquiry permitted under *Taylor* "is limited to the terms of the charging document, the terms of the plea agreement or transcript of the factual colloquy between the judge and the defendant in which the factual basis for the plea was confirmed by the defendant, or some comparable judicial record of this information").

In *Taylor*, this Court considered whether the defendant's prior conviction for burglary under Missouri law qualified as a burglary under § 924(e)(2)(B)(ii). The Court held first that the federal statute refers not to common law burglary, but rather "generic burglary," which includes "the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." *Taylor*, 495 U.S. at 599. This Court also observed that where the state statute is broader than the generic definition, such as burglary statutes which include entry of an automobile as well as a building, "if the indictment or information and jury instructions show that the defendant was only charged with a burglary of a building, and that the jury necessarily had to find an entry of a building to convict, then the Government should be allowed to use the conviction for enhancement." *Id.* at 602.

In applying the categorical approach required under *Taylor*, it is clear that under Florida law, mere possession of cocaine does not qualify as a serious drug

offense. A state offense only becomes a serious drug offense under the ACCA when the offense involves manufacturing, distributing, or possessing with intent to manufacture or distribute **and** the maximum term of imprisonment for the offense is ten years or more. Failure to meet either prong means that the offense is not a serious drug offense for purposes of the enhancement under the ACCA.

Florida law provides many ways to prove drug trafficking. Specifically, a person trafficks in cocaine if he or she sells, purchases, manufactures, delivers, or brings into the state, **or** who is in actual or constructive possession of 28 grams or more of cocaine. *See* Fla. Stat. § 893.135(b)(1). The statute provides for an increased sentence if the amount of cocaine is 200 or more grams, but less than 400 grams. *See* Fla. Stat. § 893.135(b)(1)(b).

In *Gibbs v. State*, 698 So.2d 1206, 1206 (Fla. 1997), the Florida Supreme Court was asked to address whether a person could be separately convicted and punished for trafficking possession of cocaine and simple possession of a controlled substance for the same quantity of cocaine. The Florida Supreme Court held that the elements in the statute prohibiting trafficking possession were not different from the elements in the statute prohibiting simple possession. *Id.* at 1208-1209. By so holding, the Court found that the quantity requirement of trafficking possession was not a separate element, thus, a State was not allowed the dual prosecution of both trafficking possession and simple possession arising out of the possession of the same cocaine. *Id.* at 1209. Additionally, the Court stated that "the gravamen of the crime underlying each statute is the possession of an illegal drug." *Id.*

More important, however, the Court stated that:

The conduct element of the drug trafficking statute is not compared by

> considering the entire range of conduct including possession, sale, purchase, and delivery, but rather by comparing only trafficking possession with simple possession. This is a different situation from a case in which the defendant is charged with both trafficking sale and simple possession, because the sale element of the trafficking statute differs from the elements in the simple possession statute.

Id. at 1209-1210. The Florida Supreme Court clearly indicates that trafficking possession in Florida does not involve distribution or manufacture, or the intent to distribute or manufacture.

Although the possession of a large quantity of drugs might lead to an inference that the person intended to distribute or manufacture the drugs, Florida law does not require the inference as a matter of law. Under the categorical approach required under *Shepard* and *Taylor*, and because the government failed to provide any admissible documents that Mr. James' drug conviction really did involve the manufacturing, distributing, or possessing with intent to manufacture or distribute cocaine, Mr. James' drug conviction was not a serious drug offense under the statute.

As such, this Court should grant his petition for a writ of certiorari.

Issue II

The Eleventh Circuit erred by holding that all convictions in Florida for attempted burglary qualify as a violent felony under 18 U.S.C. § 924(e), creating a circuit conflict on the issue.

The ACCA provides a mandatory sentence for a person who violates § 922(g) and has three prior convictions for a violent felony or a serious drug offense, or both. *See* 18 U.S.C. § 924(e). The statute defines a violent felony as:

> [A]ny crime punishable by imprisonment for a term exceeding one year . . . that–
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another . . . .

18 U.S.C. § 924(e)(2)(B). The definition of a qualifying state offense under the ACCA is a matter of federal law. *See Taylor*, 495 U.S. at 590-591. This Court further stated that in deciding whether a crime is a violent felony under either subparagraph of § 924(e)(2)(B), sentencing courts should look to the statutory definition of the crime charged, rather than the actual facts of the individual's prior conviction. *Id.* at 600-602. This categorical approach, which is consistent with the statutory language as well as the legislative history of the ACCA, is designed to avoid "the practical difficulties and potential unfairness of a factual approach" to each prior conviction. *Id.* at 601.

The issue presented in this petition is whether a conviction in Florida for attempted burglary always qualifies as a predicate offense under § 924(e). As recognized in *United States v. Strahl*, 958 F.2d 980, 985-986 (10th Cir. 1992), Congress did not specifically include convictions for attempted burglaries as

predicate offenses under § 924(e). "Yet, in the language immediately preceding the burglary provision, Congress did expressly include 'attempted use . . . .of physical force' as a predicate offense to enhancement." *Strahl*, 958 F.2d at 986 (citing 18 U.S.C. § 924(e)(2)(B)(i)). Moreover, in two previous versions of the ACCA that were passed by the Senate but never enacted into law, the predicate offenses specifically included attempted burglaries. *See* 130 Cong.Rec. 3,100 (1984)(Senate bill 52 provided federal criminal offense for "[w]hoever carries a firearm during the commission of a robbery or burglary offense . . ., or attempts or conspires to do so," after two prior convictions for "any robbery or burglary offense, or a conspiracy or attempt to commit such an offense"); 128 Cong.Rec. 26,436 (1982)(Senate bill 1688 provided federal criminal offense for "[a]ny person who while he or any other participant in the offense is in possession of or has readily available any firearm or imitation thereof, commits, or conspires or attempts to commit robbery or burglary . . ." after two prior convictions for "robbery or burglary, or an attempt or conspiracy to commit such an offense").[2] Because, Congress did not specifically include attempted burglary as a violent offense when it specified burglary as a violent felony, attempted burglary can only be a predicate offense if it "otherwise involves conduct that presents a serious risk of physical injury to another."[3] 18 U.S.C. § 924(e)(2)(B)(ii).

Before delving into cases addressing the issue, it is necessary to review the

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[2] For a more thorough history of the ACCA, *see Strahl*, 958 F.2d at 985-986.

[3] Additionally, attempted burglary would not qualify under the first subparagraph of § 924(e)(2)(B), as attempted burglary in Florida does not require the use or threat of use of physical force in order to convict a defendant.

elements of attempted burglary in Florida: (1) the intent to commit burglary,[4] and (2) some overt act directed toward its commission. *See Jones v. State*, 608 So.2d 797, 798 (Fla. 1992). In contrast to several states, Florida does not require that the defendant come within dangerous proximity to success to be convicted under the attempt statute. *See United States v. Weekley*, 24 F.3d 1125, 1127 n.2 (9th Cir. 1994).

A circuit split exists whether an attempted burglary convictions qualifies under the ACCA. *See United States v. Martinez*, 954 F.2d 1050, 1053-1054 (5th Cir. 1992)(holding that attempted burglary conviction from Texas did not qualify); *Strahl*, 958 F.2d at 986 (holding that attempted burglary conviction from Utah did not qualify); *Weekley*, 24 F.3d at 1126-1127 (holding that attempted burglary conviction from Washington did not qualify). *But see United States v. Davis*, 16 F.3d 212, 217 (7th Cir. 1994)(holding that attempted burglary under Illinois law did qualify); *United States v. Custis*, 988 F.2d 1355, 1364 (4th Cir. 1993)(holding that attempted burglary under Maryland law did qualify); *United States v. Lane*, 909 F.2d 895, 903 (6th Cir. 1990))(holding that attempted burglary under Ohio law did qualify); *United States v. Demint*, 74 F.3d 876, 877-878 (8th Cir. 1996)(holding that attempted burglary under Florida law did qualify).

In *Martinez*, the government argued that the defendant's convictions for attempted burglary were the equivalent to burglary convictions. *Martinez*, 954 F.2d at 1052. The Fifth Circuit rejected the argument. The court initially examined the definition of burglary for purposes of § 924(e) under *Taylor*:

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[4] For offenses committed on or before July 1, 2001, burglary means entering or remaining in a dwelling, a structure, or a conveyance with the intent to commit an offense therein. *See* Fla. Stat. § 810.02(1)(a).

> "[A] person has been convicted of burglary for purposes of a § 924(e) enhancement if he is convicted of any crime, regardless of its exact definition or label, having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime."

Id. at 1052-1053 (quoting *Taylor*, 495 U.S. at 599, 110 S. Ct. at 2158). Based on *Taylor*'s definition of burglary, the court easily concluded under Texas law, "attempted burglary does not demonstrate, as a matter of law, that those convictions included the essential elements of entry into a building." *Id.* As such, attempted burglary did not qualify under the first part of subparagraph § 924(e)(2)(B)(ii).

Additionally, the court rejected the argument that attempted burglary presented a serious potential risk of physical injury to another. First, the court stated that if Congress had wished to include attempted burglary as a predicate offense, it could have done so. *Id.* at 1053. Second, the court noted that because attempted burglary did not require entry into the building, "it simply does not present the same danger that is presented by burglary." *Id.* Accordingly, "while attempted burglary does indeed present some risk of potential harm, that risk does not rise to the same level of risk presented by burglary." *Id.* at 1054. Finally, under Texas law, a defendant who had taken steps toward the commission of the burglary could be arrested far from the target of the burglary and still be convicted of the attempt.[5] Thus, the court concluded that the fact that the defendant did not complete the burglary offense "does indeed reduce the potential risk of injury to others." *Id.*

In *Weekley*, the Ninth Circuit similarly rejected the argument that attempted burglary posed a serious potential risk of physical injury to another. The court began

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[5] This is similar to the law of attempted burglary in Florida. *See Jones*, 608 So.2d at 798.

by analyzing the contrary opinions by other circuits. The court characterized the Seventh and Fourth Circuits as allowing an attempted burglary conviction to operate as a predicate "if *most* attempt convictions would meet a threshold level of risk." *Weekley*, 24 F.3d at 1126 (emphasis in original). In contrast to these circuits, the Tenth and Fifth Circuit required "*every* attempt conviction to meet the threshold level of risk." *Id.* (emphasis in original). The Ninth Circuit found that the approach taken by the Fifth and Tenth Circuits was more consistent with the categorical approach required under *Taylor*. *Id.* In applying this approach, the court found that Washington allowed an attempted burglary conviction "for relatively unrisky 'substantial step' conduct." *Id.* at 1127. As such, the attempted burglary conviction could not serve as a predicate offense under § 924(e).

The Eleventh Circuit rejected the position Mr. James advocated and also rejected the Fifth and Ninth Circuits' position on the issue. *See James*, 430 F.3d at 1156-1157. Instead, the court adopted the position of the Eighth Circuit and held that attempted burglary in Florida presents a potential risk of physical injury. In *Demint*, the Eighth Circuit cited to some older Florida cases and concluded that "Florida's attempted burglary law punishes only 'conduct that presents a serious potential risk of physical injury to another.'" *Demint*, 74 F.3d at 878. Mr. James submits that the Eighth Circuit erred in its analysis, especially due to the fact that the court failed to acknowledge a 1992 decision by the Florida Supreme Court. In *Jones*, the Florida Supreme Court defined attempted burglary. *Jones*, 608 So.2d at 798. Nowhere in the elements of attempted burglary does Florida require that the defendant gain entry to

a dwelling,[6] nor does Florida require that the conduct present any risk of physical injury whatsoever. Therefore, the Eighth Circuit's conclusion to the contrary was not in conformity with Florida law.

As the Ninth Circuit has stated: "A risk is a risk. But a risk of a risk is not enough of a risk." *Weekley*, 24 F.3d at 1125. Under Florida law, attempted burglary is just a risk of a risk. Florida law does not require that a defendant come within dangerous proximity to success to be convicted under the attempt statute. Due to the circuit conflict, this Court should grant his petition for a writ of certiorari.

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[6] In fact, a person would be not guilty of attempted burglary if he or she actually gained entrance to the dwelling. *See Pepitone v. State*, 846 So.2d 640, 642 (Fla. 2d DCA 2003).

Issue III

The felon-in-possession statute, 18 U.S.C. § 922(g), is facially invalid because Congress failed to define commerce as interstate or foreign commerce. Additionally, whether the statute is unconstitutional because Congress acted beyond the power of the commerce clause by failing to require a substantial nexus.

Although the felon-in-possession statute has previously been found valid by this Court, this Court has not expressly addressed whether 18 U.S.C. § 922(g) is unconstitutional on its face. Specifically, the statute requires possession of a gun in or affecting commerce but neither § 922, § 921 (the preceding definitional section of the statute), nor § 10 (the general definitional section of the statute) limits commerce to interstate or foreign commerce. Mr. James is also challenging the constitutionality of the statute on the ground that the statute is invalid because Congress acted beyond the power of the commerce clause by failing to require a substantial nexus.

A. Statute Facially Invalid

Section 922(g) is unconstitutional because it requires possession of a firearm "in or affecting commerce" but neither § 922, § 921 (definitional section preceding the statute), nor § 10 (general definitional section of Title 18) limits commerce to "interstate commerce."

Under the general definitional section of Title 18, section 10 defines only interstate and foreign commerce. *See* 18 U.S.C. § 10. The term "commerce" by itself is not defined in the section. Additionally, under § 921, the term "interstate or foreign commerce" is defined. However, throughout Title 18, the term commerce by itself is never defined (*i.e.*, commerce is never defined as "interstate or foreign commerce").

Thus, the term commerce in § 922(g) could refer to purely intrastate commerce, or interstate commerce, or foreign commerce. The statute is unclear as to the type of commerce required.

A brief examination of the entire statute (*i.e.*, all of 18 U.S.C. § 922) is quite revealing. In § 922(a)(1) - ship, transport, or receive any firearm - Congress limited the use of this section of the statute to "interstate or foreign commerce." *See* 18 U.S.C. § 922(a)(1). In § 922(a)(2) - ship or transport firearm to person other than licensed person - Congress limited the use of this section to "interstate or foreign commerce." 18 U.S.C. § 922(a)(2). In § 922(e) - deliver to common or contract carrier for transportation of shipment - Congress limited the use of this section to "interstate or foreign commerce." *See* 18 U.S.C. § 922(e). In § 922(f)(1) and (2) - common or contract carrier to transport or deliver - Congress limited the use of these sections to "interstate or foreign commerce." *See* 18 U.S.C. § 922(f)(1) and (2). Even in § 922(g), Congress limited the use of this section of the statute in certain parts to "interstate or foreign commerce." Specifically, § 922(g) states that:

> It shall be unlawful for any person-- . . . to ship or transport in **interstate or foreign commerce**, or possess in or affecting **commerce**, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in **interstate or foreign commerce.**

18 U.S.C. § 922(g) (emphasis added). Only the part dealing with possessing a firearm or ammunition fails to limit the use of the statute to "interstate or foreign commerce." Continuing a review of § 922 would find a consistent limitation; specifically, each section of the statute limits the use of the statute to interstate or foreign commerce except in § 922(g) dealing with the possession of a firearm or ammunition. Without this limitation, the felon-in-possession statute is facially invalid because the statute

is inconsistent with the power granted to Congress by the commerce clause.

The Eleventh Circuit rejected the same issue as to the facial validity of 18 U.S.C. § 922(g) in *United States v. Nichols*, 124 F.3d 1265 (11th Cir. 1997). In *Nichols*, the court stated that the Supreme Court "has held that the phrase 'in or affecting commerce' indicates a Congressional intent to assert its full Commerce Clause power." *Id.* at 1266. Mr. James respectfully submits that *Nichols* was wrongly decided.[7]

B. *United States v. Lopez*

Assuming that this Court does not find the statute facially invalid, this Court should still find the statute unconstitutional because Congress acted beyond the power of the commerce clause by failing to require that the possession of the firearm by a felon substantially affect interstate commerce. In 1995, this Court clarified the proper analysis of commerce clause power. *See United States v. Lopez*, 514 U.S. 549 (1995). In his concurring opinion in *Lopez*, Justice Thomas noted that:

> [T]he power to regulate "commerce" can by no means encompass authority over **mere gun possession**, any more that it empowers the Federal Government to regulate marriage, littering, or cruelty to animals, throughout the 50 states. Our Constitution quite properly leaves such matters to the individual States, notwithstanding these activities' on interstate commerce.

Id. at 585 (Thomas, J., concurring)(emphasis added).

However, circuit courts considering the constitutionality of § 922(g)(1) have failed to heed Justice Thomas' words. Appellate courts, including the Eleventh

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[7] In the present case, the Eleventh Circuit rejected Mr. James' argument stating that it would not be considered by the court because it was raised for the first time on appeal. *See James*, 430 F.3d at 1153 n.1. Rather than declining to consider the issue, the Eleventh Circuit should have reviewed the claim for plain error. *See United States v. Olano*, 507 U.S. 725 (1993)

Circuit, have thus far declined to follow the teachings of *Lopez* to find that this statute is an unconstitutional exercise of commerce clause power. *See, e.g., United States v. McAllister*, 77 F.3d 387, 390 (11th Cir. 1996); *United States v. Wells*, 98 F.3d 808, 811 (4th Cir. 1996)(listing cases in accord).

C. Commerce Clause Power

The Tenth Amendment to the Constitution reserves to the States all powers not specifically granted to the federal government. The "powers delegated by the [proposed] Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." *Lopez*, 514 U.S. at 552 (quoting *The Federalist No. 45*, pp. 292-293 (C. Rossiter ed. 1961)). One of the powers the Constitution grants Congress is the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST., ART. I, § 8, cl. 3.

Lopez identified three areas of activity that Congress may regulate under the commerce clause: 1) use of channels of interstate commerce; 2) instrumentalities of interstate commerce, or people or things in interstate commerce; and 3) activities having a substantial relationship to commerce. *Lopez*, 514 U.S. at 557-561. As for the third category, this Court admitted that its case law "has not been clear whether an activity must 'affect' or 'substantially affect' interstate commerce in order to be within Congress' power to regulate it under the Commerce Clause." *Id.* at 559. This Court concluded that the proper analysis is whether the targeted activity **substantially affects** interstate commerce. *Id.*

As Justice Thomas did in his concurrence, the majority in *Lopez* stressed that the federal commerce power should not be expanded to obliterate the distinction

between national and local government. *Id.* at 555-558. The States possess primary authority for defining and enforcing criminal law. *Id.* at 561 n.3. For Congress to enact a criminal statute to address conduct already prohibited by the states would significantly change the federal-state balance. *See United States v. Bass*, 404 U.S. 336, 349-350 (1971). Here, Florida has already made it unlawful for a convicted felon to possess a weapon. *See* Fla. Stat. § 790.23.

The *Lopez* Court also recognized the suggestion in its commerce clause cases that only a minimal connection with commerce was required. However, *Lopez* emphasized that the Court has never "declared that Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities." *Lopez*, 514 U.S. at 558. "[O]nly where *a general regulatory statute bears a substantial relation to commerce*, the *de minimis* character of individual instances arising under that statute is of no consequence." *Id.* (emphasis in original).

Most circuit courts considering § 922(g) after *Lopez* have found that the jurisdictional phrase "in or affecting commerce" saves the statute. *E.g., McAllister*, 77 F.3d at 390; *United States v. Bell*, 70 F.3d 495, 498 (7th Cir. 1995); *United States v. Lewis*, 100 F.3d 49, 51 (7th Cir. 1996). This language does not make § 922(g) constitutional because it does not require a substantial effect on commerce. Without a requirement of substantial effect on commerce, the statute in essence only regulates "mere possession." Such mere possession of a firearm by a convicted felon, like possession of a firearm in a school zone, is not "an essential part of a larger regulation of economic activity, in which the regulatory scheme will be undercut unless the intrastate activity were regulated." *Lopez*, 514 U.S. at 561. This statute, like §

922(q), cannot be upheld as regulating activity that arises out of or is connected with a commercial transaction, which viewed in the aggregate, substantially affects commerce. *See id.* Possession of a firearm, in and of itself, does not affect commerce, even in the aggregate.

D. Individual Nexus

Furthermore, in *Bass*, this Court considered 18 U.S.C. § 1202(a) - the forerunner to § 922(g) - and held that the government must prove an interstate nexus in each case. *Bass*, 404 U.S. at 348. Without that proof in each case, the statute would impermissibly intrude on the criminal jurisdiction of states. *Id.* at 350. *Bass* suggested that the government could prove the interstate nexus for possession "if at the time of the offense the gun was moving interstate or on an interstate facility, or if the possession affects commerce." *Id.*

However, in *Scarborough v. United States*, 431 U.S. 563, 570-577 (1977), this Court held that the government could establish the nexus by showing that the firearm had traveled in interstate commerce at some point before the felon's possession. Thus, the government generally, as here, simply presents evidence that the guns were manufactured in another state. However *Scarborough*'s holding is questionable because it found that Congress intended only a **minimal** nexus with interstate commerce. *Id.* at 577. It is clear now, after *Lopez*, that the Constitution requires a substantial connection with commerce to support federal jurisdiction. In two federal arson cases after *Lopez*, the Eleventh Circuit and the Ninth Circuit recognized that *Lopez* requires the government to establish the substantial impact on commerce in each individual case. *United States v. Denalli*, 73 F.3d 328 (11th Cir.), *amended in part*, 90 F.3d 444 (1996); *United States v. Pappadopoulos*, 64 F.3d 522 (9th Cir.

1995). These cases both addressed the sufficiency of evidence for arson of private homes.

- The language of the federal arson statute is similar to that of § 922(g) because it prohibits destruction of property "used in interstate or foreign commerce or in an activity affecting interstate or foreign commerce." 18 U.S.C. § 844(i). The Ninth Circuit concluded that:

> [W]here Congress seeks to regulate a purely intrastate noncommercial activity that has traditionally been subject to exclusive regulation by state or local government, and where the connection of the regulated activity as a whole to interstate commerce is neither readily apparent nor illuminated by express congressional findings, the government must satisfy the jurisdictional requirement by pointing to a "substantial" effect on or connection to interstate commerce.

Pappadopoulos, 64 F.3d at 527. The Eleventh Circuit similarly found that the government had to prove that the destruction of a private home had a substantial effect on commerce. *Denalli*, 90 F.3d at 444.

So far, the Eleventh Circuit has declined to apply this evidentiary requirement to § 922(g), finding the movement across state lines to be a sufficient impact. *E.g., McAllister*, 77 F.3d at 390. The court continues to rely on *Scarborough*, despite the clear holding of *Lopez* that a substantial impact is required. However § 922(g), like the federal arson statute, is not an economic or regulatory statute; it is a criminal statute, with a commerce element similar to that of the arson statute. There is no reason not to require the same federal nexus for § 922(g) as for the arson statute. Proof of a **substantial** impact on commerce should be required in each individual case.

The *Lopez* court acknowledged that it has previously reserved the question whether Congress could constitutionally regulate the "mere possession" of firearms.

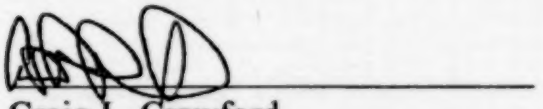
Lopez, 514 U.S. at 562. That is essentially what § 922(g) does. The statute is unconstitutional. Or, if the statute is constitutional, it can only be so if the government is required to show a substantial effect on commerce in each individual case.

CONCLUSION

Based on the foregoing reasoning and citations of authority, Mr. James requests that this Court grant his petition for a writ of certiorari.

Respectfully submitted this 14th day of February, 2006.

R. Fletcher Peacock
Federal Public Defender



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APPENDIX A

Opinion of the Eleventh Circuit Court of Appeals, vacating and remanding Mr. James' sentence in *United States v. James,* No. 04-12915, 430 F.3d 1150 (11th Cir. November 17, 2005)

Briefs and Other Related Documents

United States Court of Appeals,
Eleventh Circuit.
UNITED STATES of America, Plaintiff-Appellant-Cross-Appellee,
v.
Alphonso JAMES, Jr., Defendant-Appellee-Cross-Appellant.
No. 04-12915.

Nov. 17, 2005.

Background: Defendant was convicted of possessing firearm after having previously been convicted of felony by the United States District Court for the Middle District of Florida, No. 03-00072-CR-FTM-29-DNF, John E. Steele, J., which denied government's request for sentencing as armed career criminal, and both sides appealed.

Holdings: The Court of Appeals, Wilson, Circuit Judge, held that:
(1) defendant's prior conviction of Florida offense of trafficking in cocaine by possessing more than 28 grams thereof qualified as "serious drug offense," for purpose of sentencing under the Armed Career Criminal Act (ACCA); and
(2) defendant's prior conviction of Florida offense of attempted burglary presented potential risk of physical injury, and thus qualified as "violent felony," for purpose of sentencing under the ACCA.
Vacated and remanded.

West Headnotes

[1] Criminal Law ⇐1139
110k1139
Court of Appeals reviews *de novo* whether defendant's prior conviction was for "violent felony" or for "serious drug offense," for sentencing purposes under the Armed Career Criminal Act (ACCA). 18 U.S.C.A. § 924(e).

[2] Sentencing and Punishment ⇐1273
350Hk1273
Defendant's prior conviction of Florida offense of trafficking in cocaine by possessing more than 28 grams thereof qualified as "serious drug offense," for purpose of sentencing under the Armed Career Criminal Act (ACCA), though this state law offense did not have as express element the manufacture, distribution, or possession with intent to manufacture or distribute cocaine; Florida legislature, in making trafficking offenses the most serious offense under Florida's three-tiered scheme, necessarily inferred intent to distribute based on quantity of drugs that defendant needed to possess to be guilty of trafficking therein. 18 U.S.C.A. § 924(e); West's F.S.A. § 893.135(1)(b)(1)(b).

[3] Sentencing and Punishment ⇐1257
350Hk1257
To determine whether particular offense is "serious drug offense," for purpose of sentencing under the Armed Career Criminal Act (ACCA), sentencing courts adopt a categorical approach and look only to statutory definition of crime, rather than to actual facts of defendant's prior conviction. 18 U.S.C.A. § 924(e).

[4] Federal Courts ⇐404
170Bk404
Whether defendant's prior state law offense qualifies as "serious drug offense," for purpose of sentencing under the Armed Career Criminal Act (ACCA), is matter of federal law. 18 U.S.C.A. § 924(e).

[5] Sentencing and Punishment ⇐1273
350Hk1273
Defendant's prior state law offense may qualify as "serious drug offense," for purpose of sentencing under the Armed Career Criminal Act (ACCA), even though this state law offense does not have as element the manufacture, distribution or possession of drugs with intent to manufacture or distribute. 18 U.S.C.A. § 924(e).

[6] Sentencing and Punishment ⇐1285
350Hk1285
Defendant's prior conviction of Florida offense of attempted burglary presented potential risk of physical injury, and thus qualified as "violent felony," for purpose of sentencing under the Armed Career Criminal Act (ACCA). 18 U.S.C.A. § 924(e)(2)(B).
***1151** Karin B. Hoppmann, Tampa, FL, Jeffrey F. Michelland, Fort Myers, FL, for U.S.

Craig L. Crawford and R. Fletcher Peacock, Fed. Pub. Defenders, Orlando, FL, Martin Derovanesian, Asst. Fed. Pub. Def., Fort Myers, FL, for James.

Appeals from the United States District Court for the Middle District of Florida.

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Before BLACK, WILSON and COX, Circuit Judges.

WILSON, Circuit Judge:

This appeal addresses whether certain Florida state convictions qualify as predicate felony convictions under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e). Alphonso James, Jr. was indicted for possessing a firearm after having been convicted of a felony, in violation of 18 U.S.C. § 922(g)(1). At sentencing, the district court found that two of James's *1152 previous felony convictions qualified as predicate convictions under the ACCA, but rejected a third conviction, and therefore, did not enhance James's sentence under the ACCA. The United States ("the Government") appeals the district court's ruling. James cross-appeals, challenging the district court's decision to count one of his previous convictions as a qualifying felony under the ACCA. James also argues that § 922(g) is unconstitutional.

We hold that the district court erred when it held that James's Florida conviction for trafficking in cocaine by possession of between 200 and 400 grams of cocaine was not a predicate conviction under the ACCA. We therefore vacate the sentence imposed and remand, directing the district court to sentence James in accordance with the ACCA.

I. BACKGROUND

In June of 2003, the Government charged James with possession of a firearm after having been convicted of a felony, in violation of 18 U.S.C. § 922(g)(1). James pled guilty as charged.

The Government sought to have James's sentence enhanced under the ACCA, 18 U.S.C. § 924(e). The ACCA provides a mandatory minimum term of imprisonment of 15 years for any person who violates 18 U.S.C. § 922(g) after three convictions in either federal or state court for a "violent felony" or "serious drug offense." *See* § 924(e). In 1997, James was convicted in a Florida state court of attempted burglary of a dwelling, in violation of Florida Statute §§ 810.02 and 777.04. In 1998, James was convicted in Florida state court of trafficking in illegal drugs in violation of Florida Statute § 893.135. Later that year, James was again convicted in Florida state court under the same statute for trafficking in cocaine by possession of between 200 and 400 grams of cocaine. Based on James's three prior felony convictions, the probation officer recommended that James be sentenced as an armed career criminal under the ACCA.

At sentencing, James objected, arguing that neither his attempted burglary conviction, nor his trafficking by possession conviction, should count as a predicate conviction under the ACCA. The district court concluded that James's attempted burglary conviction was a "violent felony" under § 924(e)(2)(B) of the ACCA. The district court also concluded, however, that James's trafficking by possession conviction did not qualify as a "serious drug offense" under § 924(e)(2)(A) of the ACCA, reasoning that the Florida statute under which James was convicted did not include as an element of proof that James had intended to distribute his 200 to 400 grams of cocaine. Therefore, the district court refused to enhance James's sentence under the ACCA because he did not qualify as an armed career criminal, as he had only two predicate convictions. The district court sentenced James to 71 months' imprisonment, followed by 36 months' supervised release.

The Government now appeals the district court's decision not to count James's trafficking by possession conviction as a "serious drug offense" for purposes of sentencing him under the ACCA. James cross-appeals, challenging the district court's decision to count his attempted burglary conviction as a "violent felony." James further argues that § 922(g) is unconstitutional either facially, or as applied to him, because it exceeds Congress's authority under the Commerce Clause.

II. DISCUSSION

*1153 [1] There are two issues on appeal: [FN1] (1) whether the district court erred by failing to count James's conviction for trafficking in cocaine by possession of between 200 and 400 grams of cocaine as a "serious drug offense" under the ACCA; and (2) whether the district court erred by counting James's conviction for attempted burglary of a dwelling as a "violent felony" under the same statute. We review *de novo* whether a conviction is a "violent felony" or a "serious drug offense" within the meaning of § 924(e). *United States v. Wilkerson*, 286 F.3d 1324, 1325 (11th Cir.2002) (per curiam).

FN1. James raises his argument that § 922(g) is unconstitutional for the first time on appeal. "This Court has repeatedly held that an issue not raised in the district court and raised for the first time in an appeal will not be considered by this court." *Access Now, Inc. v. Southwest Airlines Co.*, 385

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F.3d 1324, 1331 (11th Cir.2004) (internal quotations omitted). Therefore, James has failed to preserve this claim, and we will not address it.

A. Whether Trafficking in Cocaine by Possession of between 200 and 400 Grams of Cocaine is a "Serious Drug Offense"

[2] The Government argues that the district court erred by failing to count James's Florida state conviction for trafficking in cocaine by possession of between 200 and 400 grams of cocaine as a "serious drug offense" under the ACCA. The ACCA defines a "serious drug offense" as "an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance ..., for which a maximum term of imprisonment of ten years or more is prescribed by law." § 924(e)(2)(A)(ii).

The Florida Statute under which James was convicted, section 893.135(1)(b)(1)(b), reads as follows:

> Any person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 28 grams or more of cocaine, as described in § 893.03(2)(a)4., or of any mixture containing cocaine, but less than 150 kilograms of cocaine or any such mixture, commits a felony of the first degree, which felony shall be known as "trafficking in cocaine,".... If the quantity involved:
>
> ...
>
> b. Is 200 grams or more, but less than 400 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 7 years, and the defendant shall be ordered to pay a fine of $100,000.

The district court concluded that the statute did not satisfy the ACCA's requirement that the offense involve the "intent to manufacture or distribute," § 924(e)(2)(A)(ii), because the Florida statute does not have "as an element" of the offense an intent to manufacture or distribute.

On appeal, the Government argues that Congress defined a "serious drug offense" under the ACCA to include any state offense "involving" the intent to distribute, not only those offenses having "as an element" such intent. In support, the Government cites *United States v. Madera-Madera*, 333 F.3d 1228 (11th Cir.2003), *cert. denied*, 540 U.S. 1026, 124 S.Ct. 589, 157 L.Ed.2d 447 (2003), in which we rejected the district court's reasoning in an analogous context. In *Madera-Madera*, the defendant committed a prior offense of possession of 87 grams of methamphetamine, a violation of a Georgia law prohibiting the possession of 28 grams or more of the drug. *Id.* at 1231. We had to determine whether such an offense qualified as *1154 a "drug trafficking offense" for purposes of enhancement under the Sentencing Guidelines. *Id.* Although Georgia law expressly designated the defendant's offense as drug "trafficking," the defendant argued that the offense should not be considered a trafficking offense under the Sentencing Guidelines because he merely possessed the drugs. *Id.* We rejected this argument for several reasons. *Id.*

We explained that Georgia enacted a three-tiered scheme for punishing drug crimes: (1) possession of any amount; (2) possession with the intent to distribute any amount; and (3) "trafficking" by possession of more than 28 grams. *Id.* Further, we concluded that such a scheme necessarily recognizes that someone who is convicted of drug trafficking, the offense to which the defendant pled guilty, "plans on distributing and thereby 'trafficking' those drugs. In making possession of 28 grams of methamphetamine a 'trafficking' offense, Georgia's trafficking statute necessarily infers an intent to distribute once a defendant possess a certain amount of drugs." *Id.* at 1232. The Government here argues that Florida has nearly an identical three-tiered scheme, and therefore, we should apply our reasoning in *Madera-Madera* to hold that Florida's drug trafficking statute also infers an intent to distribute.

In response, James relies on *Gibbs v. State*, 698 So.2d 1206 (Fla.1997), a case that the district court referenced when making its ruling. In *Gibbs*, the Florida Supreme Court held that Florida convictions for both simple possession of cocaine and drug trafficking by possession of cocaine based on the same conduct violated the Double Jeopardy Clause because none of the elements of the drug trafficking statute differed from the elements of the simple possession statute. *Id.* at 1208-10. James argues that this case indicates that drug trafficking by possession in Florida does not involve the intent to manufacture or distribute.

[3][4] In determining whether a particular offense is a "serious drug offense" under the ACCA, sentencing courts adopt a categorical approach, looking only to

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the statutory definition of the crime charged, rather than the actual facts of the individual's prior conviction. *See Taylor v. United States*, 495 U.S. 575, 600-02, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990) ; *see also, Shepard v. United States*, 544 U.S. 13, 125 S.Ct. 1254, 1257, 161 L.Ed.2d 205 (2005). The definition of a qualifying state offense under the ACCA is a matter of federal law. *Taylor*, 495 U.S. at 590-91, 110 S.Ct. 2143.

Florida, like Georgia, has a three-tiered scheme for punishing drug-related offenses. Under Florida law, those three tiers are the following: (1) possession of any amount of a controlled substance, Fla. Stat. § 893.13(6)(a); (2) possession with intent to distribute a controlled substance, § 893.13(1)(a); and (3) trafficking in cocaine by possession of 28 grams or more of the drug, § 893.135(1)(b). Under this third tier, trafficking in cocaine is further delineated according to the amount of drugs that the defendant possessed, and the sentence imposed increases accordingly. *See id.* James was convicted under this third tier for possession of between 200 and 400 grams of cocaine. Fla. Stat. § 893.135(1)(b)(1)(b).

Florida's three-tiered system for punishing drug crimes is nearly identical to Georgia's three-tiered scheme. Although *Madera-Madera* involved Georgia law, we see no reason to distinguish *Madera-Madera* from this appeal. We hold that Florida's drug trafficking statute also "infers an intent to distribute once a defendant possesses a certain amount of drugs." *Madera-Madera*, 333 F.3d at 1232. In both *1155 Florida and Georgia, the defendant must be in possession of a significant quantity of drugs, namely 28 grams, before the state deems the offense to be "trafficking." Moreover, under both the Georgia and Florida schemes, drug trafficking is a more serious offense, and is punished more harshly, than either simple possession or possession with intent to distribute. *See Gibbs*, 698 So.2d at 1209 ("[T]he legislature intended that trafficking possession, which requires the possession of more than twenty-eight grams of cocaine, be punished more harshly than simple possession, which merely requires the possession of less than twenty-eight grams of any illegal drug."). Florida's three-tiered scheme for punishing drug crimes is not materially distinguishable from Georgia's, and therefore, our reasoning in *Madera-Madera* controls this case. Accordingly, Florida's drug trafficking statute necessarily infers an intent to distribute once a defendant possesses 28 grams or more.

[5] Furthermore, it is not necessary that the Florida statute under which James was convicted include as an element of the offense an intent to manufacture or distribute cocaine in order for James to be sentenced under the ACCA, as the district court ruled. The language of the Florida statute need not exactly match the ACCA's definition of a "serious drug offense." *See Madera-Madera*, 333 F.3d at 1233 (explaining that the wording of the Georgia statute need not exactly match the wording of the Sentencing Guidelines because the Sentencing Commission did not define drug trafficking by its elements, but rather by the type of conduct prohibited). Rather, the question is whether the Florida statute falls within the ACCA's definition of a "serious drug offense." The definition broadly includes any offense "involving" the manufacture, distribution, or possession with intent to manufacture or distribute. 18 U.S.C. § 924(e)(2)(A)(ii). This "involving" language makes clear that the term "serious drug offense" may include even those state offenses that do not have as an element the manufacture, distribution, or possession of drugs with intent to manufacture or distribute. Therefore, the Florida statute falls within the broad definition of a "serious drug offense."

Finally, James was convicted of trafficking, the most serious drug offense in Florida. To hold that this conviction does not qualify as a "serious drug offense" for purposes of the ACCA enhancement would create an anomaly. *See Madera-Madera*, 333 F.3d at 1233-34 (discussing the potential anomalous result if the defendant's trafficking offense did not qualify for enhancement under the Sentencing Guidelines). If James had been convicted in Florida of a lesser offense, such as possession with intent to distribute, he would qualify for enhanced sentencing under the ACCA. However, as the case stands now, James would not qualify for such enhanced sentencing because the Government charged James with--and James pled guilty to--a more serious trafficking offense. The district court recognized this anomaly at sentencing noting that, under its ruling, James's plea to a greater offense had ensured that he would be treated more--not less--leniently under the ACCA. Such an anomalous result would thwart the ACCA's purpose. *See United States v. Pope*, 132 F.3d 684, 691 (11th Cir.1998) (noting that the ACCA was intended to provide additional punishment for habitual offenders who Congress found to be responsible for the disproportionate number of violent crimes).

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Here, James pled guilty to trafficking in cocaine by possession of between 200 and 400 grams of the drug. Florida's three-tiered scheme recognizes that someone who is in possession of between 200 and *1156 400 grams of cocaine intends to manufacture and distribute, and thereby, "traffic" those drugs. Moreover, federal law permits an inference of intent to distribute from a defendant's possession of a significantly large quantity of drugs. *See United States v. Bain*, 736 F.2d 1480, 1486 (11th Cir.1984). *Gibbs v. State*, 698 So.2d 1206, does not require a contrary result because interpretation of the term "serious drug offense" is a matter of federal law as determined by the federal courts. *See Taylor*, 495 U.S. at 590-91. Accordingly, James's conviction for trafficking in cocaine by possession of between 200 and 400 grams of cocaine falls within the ACCA's definition of a "serious drug offense."

We hold that the district court erred when it found that James's conviction for trafficking in cocaine by possession was not a qualifying conviction under the ACCA. We further find below that the district court did not err when it held that James's conviction for attempted burglary is a qualifying conviction. Therefore, because James has three qualifying felony convictions, we vacate and remand, directing the district court to sentence James in accordance with the ACCA.

B. Whether Attempted Burglary of a Dwelling is a "Violent Felony"

[6] James argues on cross-appeal that his Florida state conviction for attempted burglary is not a "violent felony" under § 924(e), and therefore, that the district court erred in counting that conviction as a qualifying conviction under the ACCA. The ACCA defines a "violent felony" as "any crime punishable by imprisonment for a term exceeding one year ... that--(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)

On appeal, James asserts that, under Florida law, attempted burglary does not fall within the definition of a "violent felony" because it does not pose a serious potential risk of physical injury to another. Instead, he argues, attempted burglary poses merely "a risk of a risk." *United States v. Weekley*, 24 F.3d 1125, 1125 (9th Cir.1994).

In response, the Government relies on our precedent in *United States v. Wilkerson*, 286 F.3d at 1326 (quoting § 924(e)(2)(B)(ii), in which we established that an incohate crime qualified as a violent felony when its object involved conduct that "present[ed] a serious potential risk of physical injury to another.") In *Wilkerson*, we held that a conviction for conspiracy to commit robbery in violation of Florida law qualified as a "violent felony." *Id.* First, we reasoned that robbery itself was a "violent felony" under § 924(e)(2)(B) because it presented a serious risk of physical injury to another. *Id.* at 1325. We further reasoned that "a conspiracy that has as its object the offense of robbery likewise presents such a risk." *Id.* We noted that "[w]hen one reaches an agreement with a co-conspirator to commit a robbery, and formulates the intent to commit the robbery, his conduct presents at least a potential risk of physical injury within the meaning of § 924(e)(2)(B)(ii)." *Id.* at 1325-26.

Likewise, the Government cites *United States v. Rainey*, 362 F.3d 733 (11th Cir.2004) (per curiam), *cert. denied*, 541 U.S. 1081, 124 S.Ct. 2433, 158 L.Ed.2d 996 (2004), the case upon which the district court based its decision. In *Rainey*, we relied on *Wilkerson* to hold that a conviction for attempted arson under Florida law *1157 qualified as a "violent felony" under § 924(e)(2)(B)(ii). *Rainey*, 362 F.3d at 736. In *Rainey*, we noted that we had not previously decided whether an attempt to commit an enumerated felony under § 924(e) constituted a "violent felony." *Id.* at 735. However, following our reasoning in *Wilkerson*, we held that "[a]ttempt, like conspiracy, presents the potential risk of physical injury to another. Because attempted arson presents a serious potential risk of injury to another, we [held] that the district court correctly concluded that it [was] a violent felony under § 924(e)." *Id.* at 736. Moreover, in *United States v. Gunn*, 369 F.3d 1229, 1238 (11th Cir.2004) (per curiam), *cert. denied*, *Cantillo v. United States*, 543 U.S. 937, 125 S.Ct. 324, 160 L.Ed.2d 244 (2004), we held that attempted burglary is a "crime of violence" for purposes of United States Sentencing Guidelines Manual § 4B1.1(a)(2), reasoning that "[a]ttempted burglary presents a serious potential risk of physical injury to another. An uncompleted burglary does not diminish the potential risk of physical injury."

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Relying on our precedent in *Wilkerson* and *Rainey*, we affirm the district court's ruling and hold that attempted burglary under Florida law is a "violent felony" under § 924(e)(2)(B). The district court ruled that, because burglary is an enumerated felony under § 924(e)(2)(B)(ii), and because under *Rainey* an attempt to commit an enumerated felony under § 924(e)(2)(B)(ii) constitutes a "violent felony," attempted burglary is also a "violent felony." We agree. We reject James's argument that attempted burglary merely poses "a risk of a risk" and instead hold that an attempt to commit burglary, like an attempt to commit arson, presents the potential risk of physical injury to another sufficient to satisfy the ACCA's definition of a "violent felony."

III. CONCLUSION

For the above reasons, we vacate James's sentence and remand, directing the district court to sentence James in accordance with the ACCA.

VACATED AND REMANDED.

430 F.3d 1150

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APPENDIX B

U.S. CONST., ART. I, § 8

Section 8. The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States;

To borrow money on the credit of the United States;

To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;

To establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;

To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;

To provide for the punishment of counterfeiting the securities and current coin of the United States;

To establish post offices and post roads;

To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;

To constitute tribunals inferior to the Supreme Court;

To define and punish piracies and felonies committed on the high seas, and offenses against the law of nations;

To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;

To provide and maintain a navy;

To make rules for the government and regulation of the land and naval forces;

To provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions;

To provide for organizing, arming, and disciplining, the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress;

To exercise exclusive legislation in all cases whatsoever, over such District (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings;--And

To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.

APPENDIX C

18 U.S.C. § 922

Title 18, U.S.C. § 922. Unlawful acts

(a) It shall be unlawful--

(1) for any person--

(A) except a licensed importer, licensed manufacturer, or licensed dealer, to engage in the business of importing, manufacturing, or dealing in firearms, or in the course of such business to ship, transport, or receive any firearm in interstate or foreign commerce; or

(B) except a licensed importer or licensed manufacturer, to engage in the business of importing or manufacturing ammunition, or in the course of such business, to ship, transport, or receive any ammunition in interstate or foreign commerce;

(2) for any importer, manufacturer, dealer, or collector licensed under the provisions of this chapter to ship or transport in interstate or foreign commerce any firearm to any person other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, except that--

(A) this paragraph and subsection (b)(3) shall not be held to preclude a licensed importer, licensed manufacturer, licensed dealer, or licensed collector from returning a firearm or replacement firearm of the same kind and type to a person from whom it was received; and this paragraph shall not be held to preclude an individual from mailing a firearm owned in compliance with Federal, State, and local law to a licensed importer, licensed manufacturer, licensed dealer, or licensed collector;

(B) this paragraph shall not be held to preclude a licensed importer, licensed manufacturer, or licensed dealer from depositing a firearm for conveyance in the mails to any officer, employee, agent, or watchman who, pursuant to the provisions of section 1715 of this title, is eligible to receive through the mails pistols, revolvers, and other firearms capable of being concealed on the person, for use in connection with his official duty; and

(C) nothing in this paragraph shall be construed as applying in any manner in the District of Columbia, the Commonwealth of Puerto Rico, or any possession of the United States differently than it would apply if the District of Columbia, the Commonwealth of Puerto Rico, or the possession were in fact a State of the United States;

(3) for any person, other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector to transport into or receive in the State where he resides (or if the person is a corporation or other business entity, the State where it maintains a place of business) any firearm purchased or otherwise obtained by such person outside that State, except that this paragraph (A) shall not preclude any person who lawfully acquires a firearm by bequest or intestate succession in a State other than his State of residence from transporting the firearm into or receiving it in that State, if it is lawful for such person to purchase or possess such firearm in that State, (B) shall not apply to the transportation or receipt of a firearm obtained in conformity with subsection (b)(3) of this section, and (C) shall not apply to the transportation of any firearm acquired in any State prior to the effective date of this chapter;

(4) for any person, other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, to transport in interstate or foreign commerce any destructive device, machinegun (as defined in section 5845 of the Internal Revenue Code of 1986), short-barreled shotgun, or short-barreled rifle, except as specifically authorized by the Secretary consistent with public safety and necessity;

(5) for any person (other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector) to transfer, sell, trade, give, transport, or deliver any firearm to any person (other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector) who the transferor knows or has reasonable cause to believe does not reside in (or if the person is a corporation or other business entity, does not maintain a place of business in) the State in which the transferor resides; except that this paragraph shall not apply to (A) the transfer, transportation, or delivery of a firearm made to carry out a bequest of a firearm to, or an acquisition by intestate succession of a firearm by, a person who is permitted to acquire or possess a firearm under the laws of the State of his residence, and (B) the loan or rental of a firearm to any person for temporary use for lawful sporting purposes;

(6) for any person in connection with the acquisition or attempted acquisition of any firearm or ammunition from a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, knowingly to make any false or fictitious oral or written statement or to furnish or exhibit any false, fictitious, or misrepresented identification, intended or likely to deceive such importer, manufacturer, dealer, or collector with respect to any fact material to the lawfulness of the sale or other disposition of such firearm or ammunition under the provisions of this chapter;

(7) for any person to manufacture or import armor piercing ammunition, except that this paragraph shall not apply to--

(A) the manufacture or importation of such ammunition for the use of the United States or any department or agency thereof or any State or any department, agency, or political subdivision thereof;

(B) the manufacture of such ammunition for the purpose of exportation; and

(C) any manufacture or importation for the purposes of testing or experimentation authorized by the Secretary;

(8) for any manufacturer or importer to sell or deliver armor piercing ammunition, except that this paragraph shall not apply to--

(A) the sale or delivery by a manufacturer or importer of such ammunition for use of the United States or any department or agency thereof or any State or any department, agency, or political subdivision thereof;

(B) the sale or delivery by a manufacturer or importer of such ammunition for the purpose of exportation;

(C) the sale or delivery by a manufacturer or importer of such ammunition for the purposes of testing or experimenting authorized by the Secretary; and

(9) for any person, other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, who does not reside in any State to receive any firearms unless such receipt is for lawful sporting purposes.

(b) It shall be unlawful for any licensed importer, licensed manufacturer, licensed dealer, or licensed collector to sell or deliver--

(1) any firearm or ammunition to any individual who the licensee knows or has reasonable cause to believe is less than eighteen years of age, and, if the firearm, or ammunition is other than a shotgun or rifle, or ammunition for a shotgun or rifle, to any individual who the licensee knows or has reasonable cause to believe is less than twenty-one years of age;

(2) any firearm to any person in any State where the purchase or possession by such person of such firearm would be in violation of any State law or any published ordinance applicable at the place of sale, delivery or other disposition, unless the licensee knows or has reasonable cause to believe that the purchase or possession would not be in violation of such State law or such published ordinance;

(3) any firearm to any person who the licensee knows or has reasonable cause to believe does not reside in (or if the person is a corporation or other business entity, does not maintain a place of business in) the State in which the licensee's place of business is located, except that this paragraph (A) shall not apply to the sale or delivery of any rifle or shotgun to a resident of a State other than a State in which the licensee's place of business is located if the transferee meets in person with the transferor to accomplish the transfer, and the sale, delivery, and receipt fully comply with the legal conditions of sale in both such States (and any licensed manufacturer, importer or dealer shall be presumed, for purposes of this subparagraph, in the absence of evidence to the contrary, to have had actual knowledge of the State laws and published ordinances of both States), and (B) shall not apply to the loan or rental of a firearm to any person for temporary use for lawful sporting purposes;

(4) to any person any destructive device, machinegun (as defined in section 5845 of the Internal Revenue Code of 1986), short-barreled shotgun, or short-barreled rifle, except as specifically authorized by the Secretary consistent with public safety and necessity; and

(5) any firearm or armor-piercing ammunition to any person unless the licensee notes in his records, required to be kept pursuant to section 923 of this chapter, the name, age, and place of residence of such person if the person is an individual, or the identity and principal and local places of business of such person if the person is a corporation or other business entity.

Paragraphs (1), (2), (3), and (4) of this subsection shall not apply to transactions between licensed importers, licensed manufacturers, licensed dealers, and licensed collectors. Paragraph (4) of this subsection shall not apply to a sale or delivery to any research organization designated by the Secretary.

(c) In any case not otherwise prohibited by this chapter, a licensed importer, licensed manufacturer, or licensed dealer may sell a firearm to a person who does not appear in person at the licensee's business premises (other than another licensed importer, manufacturer, or dealer) only if--

(1) the transferee submits to the transferor a sworn statement in the following form:

"Subject to penalties provided by law, I swear that, in the case of any firearm other than a shotgun or a rifle, I am twenty-one years or more of age, or that, in the case of a shotgun or a rifle, I am eighteen years or more of age; that I am not prohibited by the provisions of chapter 44 of title 18, United States Code, from receiving a firearm in interstate or foreign commerce; and that my receipt of this firearm will not be in violation of any statute of the State and published ordinance applicable to the locality in which I reside. Further, the true title, name, and address of the principal law enforcement officer of the locality to which the firearm will be delivered are .....

Signature ..... Date ....."

and containing blank spaces for the attachment of a true copy of any permit or other information required pursuant to such statute or published ordinance;

(2) the transferor has, prior to the shipment or delivery of the firearm, forwarded by registered or certified mail (return receipt requested) a copy of the sworn statement, together with a description of the firearm, in a form prescribed by the Secretary, to the chief law enforcement officer of the transferee's place of residence, and has received a return receipt evidencing delivery of the statement or has had the statement returned due to the refusal of the named addressee to accept such letter in accordance with United States Post Office Department regulations; and

(3) the transferor has delayed shipment or delivery for a period of at least seven days following receipt of the notification of the acceptance or refusal of delivery of the statement.

A copy of the sworn statement and a copy of the notification to the local law enforcement officer, together with evidence of receipt or rejection of that notification shall be retained by the licensee as a part of the records required to be kept under section 923(g).

(d) It shall be unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person--

(1) is under indictment for, or has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) is a fugitive from justice;

(3) is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));

(4) has been adjudicated as a mental defective or has been committed to any mental institution;

(5) who, being an alien--

(A) is illegally or unlawfully in the United States; or

(B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26)));

(6) who has been discharged from the Armed Forces under dishonorable conditions;

(7) who, having been a citizen of the United States, has renounced his citizenship;

(8) is subject to a court order that restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child, except that this paragraph shall only apply to a court order that--

(A) was issued after a hearing of which such person received actual notice, and at which such person had the opportunity to participate; and

(B)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

(9) has been convicted in any court of a misdemeanor crime of domestic violence.

This subsection shall not apply with respect to the sale or disposition of a firearm or ammunition to a licensed importer, licensed manufacturer, licensed dealer, or licensed collector who pursuant to subsection (b) of section 925 of this chapter is not precluded from dealing in firearms or ammunition, or to a person who has been granted relief from disabilities pursuant to subsection (c) of section 925 of this chapter.

(e) It shall be unlawful for any person knowingly to deliver or cause to be delivered to any common or contract carrier for transportation or shipment in interstate or foreign commerce, to persons other than licensed importers, licensed manufacturers, licensed dealers, or licensed collectors, any package or other container in which there is any firearm or ammunition without written notice to the carrier that such firearm or ammunition is being transported or shipped; except that any passenger who owns or legally possesses a firearm or ammunition being transported aboard any common or contract carrier for movement with the passenger in interstate or foreign commerce may deliver said firearm or ammunition into the custody of the pilot, captain, conductor or operator of such common or contract carrier for the duration of the trip without violating any of the provisions of this chapter.

No common or contract carrier shall require or cause any label, tag, or other written notice to be placed on the outside of any package, luggage, or other container that such package, luggage, or other container contains a firearm.

(f)(1) It shall be unlawful for any common or contract carrier to transport or deliver in interstate or foreign commerce any firearm or ammunition with knowledge or reasonable cause to believe that the shipment, transportation, or receipt thereof would be in violation of the provisions of this chapter.

(2) It shall be unlawful for any common or contract carrier to deliver in interstate or foreign commerce any firearm without obtaining written acknowledgement of receipt from the recipient of the package or other container in which there is a firearm.

(g) It shall be unlawful for any person--

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) who is a fugitive from justice;

(3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));

(4) who has been adjudicated as a mental defective or who has been committed to a mental institution;

(5) who, being an alien--

(A) is illegally or unlawfully in the United States; or

(B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26)));

(6) who has been discharged from the Armed Forces under dishonorable conditions;

(7) who, having been a citizen of the United States, has renounced his citizenship;

(8) who is subject to a court order that--

(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

(9) who has been convicted in any court of a misdemeanor crime of domestic violence,

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

(h) It shall be unlawful for any individual, who to that individual's knowledge and while being employed for any person described in any paragraph of subsection (g) of this section, in the course of such employment--

(1) to receive, possess, or transport any firearm or ammunition in or affecting interstate or foreign commerce; or

(2) to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

(i) It shall be unlawful for any person to transport or ship in interstate or foreign commerce, any stolen firearm or stolen ammunition, knowing or having reasonable cause to believe that the firearm or ammunition was stolen.

(j) It shall be unlawful for any person to receive, possess, conceal, store, barter, sell, or dispose of any stolen firearm or stolen ammunition, or pledge or accept as security for a loan any stolen firearm or stolen ammunition, which is moving as, which is a part of, which constitutes, or which has been shipped or transported in, interstate or foreign commerce, either before or after it was stolen, knowing or having reasonable cause to believe that the firearm or ammunition was stolen.

(k) It shall be unlawful for any person knowingly to transport, ship, or receive, in interstate or foreign commerce, any firearm which has had the importer's or manufacturer's serial number removed, obliterated, or altered or to possess or receive any firearm which has had the importer's or manufacturer's serial number removed, obliterated, or altered and has, at any time, been shipped or transported in interstate or foreign commerce.

(l) Except as provided in section 925(d) of this chapter, it shall be unlawful for any person knowingly to import or bring into the United States or any possession thereof any firearm or ammunition; and it shall be unlawful for any person knowingly to receive any firearm or ammunition which has been imported or brought into the United States or any possession thereof in violation of the provisions of this chapter.

(m) It shall be unlawful for any licensed importer, licensed manufacturer, licensed dealer, or

licensed collector knowingly to make any false entry in, to fail to make appropriate entry in, or to fail to properly maintain, any record which he is required to keep pursuant to section 923 of this chapter or regulations promulgated thereunder.

(n) It shall be unlawful for any person who is under indictment for a crime punishable by imprisonment for a term exceeding one year to ship or transport in interstate or foreign commerce any firearm or ammunition or receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

(o)(1) Except as provided in paragraph (2), it shall be unlawful for any person to transfer or possess a machinegun.

(2) This subsection does not apply with respect to--

(A) a transfer to or by, or possession by or under the authority of, the United States or any department or agency thereof or a State, or a department, agency, or political subdivision thereof; or

(B) any lawful transfer or lawful possession of a machinegun that was lawfully possessed before the date this subsection takes effect.

(p)(1) It shall be unlawful for any person to manufacture, import, sell, ship, deliver, possess, transfer, or receive any firearm--

(A) that, after removal of grips, stocks, and magazines, is not as detectable as the Security Exemplar, by walk-through metal detectors calibrated and operated to detect the Security Exemplar; or

(B) any major component of which, when subjected to inspection by the types of x-ray machines commonly used at airports, does not generate an image that accurately depicts the shape of the component. Barium sulfate or other compounds may be used in the fabrication of the component.

(2) For purposes of this subsection--

(A) the term "firearm" does not include the frame or receiver of any such weapon;

(B) the term "major component" means, with respect to a firearm, the barrel, the slide or cylinder, or the frame or receiver of the firearm; and

(C) the term "Security Exemplar" means an object, to be fabricated at the direction of the Secretary, that is--

(i) constructed of, during the 12-month period beginning on the date of the enactment of this subsection, 3.7 ounces of material type 17-4 PH stainless steel in a shape resembling a handgun; and

(ii) suitable for testing and calibrating metal detectors:

Provided, however, That at the close of such 12-month period, and at appropriate times thereafter the Secretary shall promulgate regulations to permit the manufacture, importation, sale, shipment, delivery, possession, transfer, or receipt of firearms previously prohibited under this subparagraph that are as detectable as a "Security Exemplar" which contains 3.7 ounces of material type 17-4 PH stainless steel, in a shape resembling a handgun, or such lesser amount as is detectable in view of advances in state-of-the-art developments in weapons detection technology.

(3) Under such rules and regulations as the Secretary shall prescribe, this subsection shall not apply to the manufacture, possession, transfer, receipt, shipment, or delivery of a firearm by a licensed manufacturer or any person acting pursuant to a contract with a licensed manufacturer, for the purpose of examining and testing such firearm to determine whether paragraph (1) applies to such firearm. The Secretary shall ensure that rules and regulations adopted pursuant to this paragraph do not impair the manufacture of prototype firearms or the development of new technology.

(4) The Secretary shall permit the conditional importation of a firearm by a licensed importer or licensed manufacturer, for examination and testing to determine whether or not the unconditional importation of such firearm would violate this subsection.

(5) This subsection shall not apply to any firearm which--

(A) has been certified by the Secretary of Defense or the Director of Central Intelligence, after consultation with the Secretary and the Administrator of the Federal Aviation Administration, as necessary for military or intelligence applications; and

(B) is manufactured for and sold exclusively to military or intelligence agencies of the United States.

(6) This subsection shall not apply with respect to any firearm manufactured in, imported into, or possessed in the United States before the date of the enactment of the Undetectable Firearms Act of 1988.

(q)(1) The Congress finds and declares that--

(A) crime, particularly crime involving drugs and guns, is a pervasive, nationwide problem;

(B) crime at the local level is exacerbated by the interstate movement of drugs, guns, and criminal gangs;

(C) firearms and ammunition move easily in interstate commerce and have been found in increasing numbers in and around schools, as documented in numerous hearings in both the Committee on the Judiciary the [FN1] House of Representatives and the Committee on the Judiciary of the Senate;

(D) in fact, even before the sale of a firearm, the gun, its component parts, ammunition, and the raw

materials from which they are made have considerably moved in interstate commerce;

(E) while criminals freely move from State to State, ordinary citizens and foreign visitors may fear to travel to or through certain parts of the country due to concern about violent crime and gun violence, and parents may decline to send their children to school for the same reason;

(F) the occurrence of violent crime in school zones has resulted in a decline in the quality of education in our country;

(G) this decline in the quality of education has an adverse impact on interstate commerce and the foreign commerce of the United States;

(H) States, localities, and school systems find it almost impossible to handle gun-related crime by themselves--even States, localities, and school systems that have made strong efforts to prevent, detect, and punish gun- related crime find their efforts unavailing due in part to the failure or inability of other States or localities to take strong measures; and

(I) the Congress has the power, under the interstate commerce clause and other provisions of the Constitution, to enact measures to ensure the integrity and safety of the Nation's schools by enactment of this subsection.

(2)(A) It shall be unlawful for any individual knowingly to possess a firearm that has moved in or that otherwise affects interstate or foreign commerce at a place that the individual knows, or has reasonable cause to believe, is a school zone.

(B) Subparagraph (A) does not apply to the possession of a firearm--

(i) on private property not part of school grounds;

(ii) if the individual possessing the firearm is licensed to do so by the State in which the school zone is located or a political subdivision of the State, and the law of the State or political subdivision requires that, before an individual obtains such a license, the law enforcement authorities of the State or political subdivision verify that the individual is qualified under law to receive the license;

(iii) that is--

(I) not loaded; and

(II) in a locked container, or a locked firearms rack that is on a motor vehicle;

(iv) by an individual for use in a program approved by a school in the school zone;

(v) by an individual in accordance with a contract entered into between a school in the school zone and the individual or an employer of the individual;

(vi) by a law enforcement officer acting in his or her official capacity; or

(vii) that is unloaded and is possessed by an individual while traversing school premises for the purpose of gaining access to public or private lands open to hunting, if the entry on school premises is authorized by school authorities.

(3)(A) Except as provided in subparagraph (B), it shall be unlawful for any person, knowingly or with reckless disregard for the safety of another, to discharge or attempt to discharge a firearm that has moved in or that otherwise affects interstate or foreign commerce at a place that the person knows is a school zone.

(B) Subparagraph (A) does not apply to the discharge of a firearm--

(i) on private property not part of school grounds;

(ii) as part of a program approved by a school in the school zone, by an individual who is participating in the program;

(iii) by an individual in accordance with a contract entered into between a school in a school zone and the individual or an employer of the individual; or

(iv) by a law enforcement officer acting in his or her official capacity.

(4) Nothing in this subsection shall be construed as preempting or preventing a State or local government from enacting a statute establishing gun free school zones as provided in this subsection.

(r) It shall be unlawful for any person to assemble from imported parts any semiautomatic rifle or any shotgun which is identical to any rifle or shotgun prohibited from importation under section 925(d)(3) of this chapter as not being particularly suitable for or readily adaptable to sporting purposes except that this subsection shall not apply to--

(1) the assembly of any such rifle or shotgun for sale or distribution by a licensed manufacturer to the United States or any department or agency thereof or to any State or any department, agency, or political subdivision thereof; or

(2) the assembly of any such rifle or shotgun for the purposes of testing or experimentation authorized by the Secretary.

(s)(1) Beginning on the date that is 90 days after the date of enactment of this subsection and ending on the day before the date that is 60 months after such date of enactment, it shall be unlawful for any licensed importer, licensed manufacturer, or licensed dealer to sell, deliver, or transfer a handgun (other than the return of a handgun to the person from whom it was received) to an individual who is not licensed under section 923, unless--

(A) after the most recent proposal of such transfer by the transferee--

(i) the transferor has--

(I) received from the transferee a statement of the transferee containing the information described in paragraph (3);

(II) verified the identity of the transferee by examining the identification document presented;

(III) within 1 day after the transferee furnishes the statement, provided notice of the contents of the statement to the chief law enforcement officer of the place of residence of the transferee; and

(IV) within 1 day after the transferee furnishes the statement, transmitted a copy of the statement to the chief law enforcement officer of the place of residence of the transferee; and

(ii)(I) 5 business days (meaning days on which State offices are open) have elapsed from the date the transferor furnished notice of the contents of the statement to the chief law enforcement officer, during which period the transferor has not received information from the chief law enforcement officer that receipt or possession of the handgun by the transferee would be in violation of Federal, State, or local law; or

(II) the transferor has received notice from the chief law enforcement officer that the officer has no information indicating that receipt or possession of the handgun by the transferee would violate Federal, State, or local law;

(B) the transferee has presented to the transferor a written statement, issued by the chief law enforcement officer of the place of residence of the transferee during the 10-day period ending on the date of the most recent proposal of such transfer by the transferee, stating that the transferee requires access to a handgun because of a threat to the life of the transferee or of any member of the household of the transferee;

(C)(i) the transferee has presented to the transferor a permit that--

(I) allows the transferee to possess or acquire a handgun; and

(II) was issued not more than 5 years earlier by the State in which the transfer is to take place; and

(ii) the law of the State provides that such a permit is to be issued only after an authorized government official has verified that the information available to such official does not indicate that possession of a handgun by the transferee would be in violation of the law;

(D) the law of the State requires that, before any licensed importer, licensed manufacturer, or licensed dealer completes the transfer of a handgun to an individual who is not licensed under section 923, an authorized government official verify that the information available to such official does not indicate that possession of a handgun by the transferee would be in violation of law;

(E) the Secretary has approved the transfer under section 5812 of the Internal Revenue Code of 1986; or

(F) on application of the transferor, the Secretary has certified that compliance with subparagraph (A)(i)(III) is impracticable because--

(i) the ratio of the number of law enforcement officers of the State in which the transfer is to occur to the number of square miles of land area of the State does not exceed 0.0025;

(ii) the business premises of the transferor at which the transfer is to occur are extremely remote in relation to the chief law enforcement officer; and

(iii) there is an absence of telecommunications facilities in the geographical area in which the business premises are located.

(2) A chief law enforcement officer to whom a transferor has provided notice pursuant to paragraph (1)(A)(i)(III) shall make a reasonable effort to ascertain within 5 business days whether receipt or possession would be in violation of the law, including research in whatever State and local recordkeeping systems are available and in a national system designated by the Attorney General.

(3) The statement referred to in paragraph (1)(A)(i)(I) shall contain only--

(A) the name, address, and date of birth appearing on a valid identification document (as defined in section 1028(d)(1)) of the transferee containing a photograph of the transferee and a description of the identification used;

(B) a statement that the transferee--

(i) is not under indictment for, and has not been convicted in any court of, a crime punishable by imprisonment for a term exceeding 1 year, and has not been convicted in any court of a misdemeanor crime of domestic violence;

(ii) is not a fugitive from justice;

(iii) is not an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act);

(iv) has not been adjudicated as a mental defective or been committed to a mental institution;

(v) is not an alien who--

(I) is illegally or unlawfully in the United States; or

(II) subject to subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C.

1101(a)(26)));

(vi) has not been discharged from the Armed Forces under dishonorable conditions; and

(vii) is not a person who, having been a citizen of the United States, has renounced such citizenship;

(C) the date the statement is made; and

(D) notice that the transferee intends to obtain a handgun from the transferor.

(4) Any transferor of a handgun who, after such transfer, receives a report from a chief law enforcement officer containing information that receipt or possession of the handgun by the transferee violates Federal, State, or local law shall, within 1 business day after receipt of such request, communicate any information related to the transfer that the transferor has about the transfer and the transferee to--

(A) the chief law enforcement officer of the place of business of the transferor; and

(B) the chief law enforcement officer of the place of residence of the transferee.

(5) Any transferor who receives information, not otherwise available to the public, in a report under this subsection shall not disclose such information except to the transferee, to law enforcement authorities, or pursuant to the direction of a court of law.

(6)(A) Any transferor who sells, delivers, or otherwise transfers a handgun to a transferee shall retain the copy of the statement of the transferee with respect to the handgun transaction, and shall retain evidence that the transferor has complied with subclauses (III) and (IV) of paragraph (1)(A)(i) with respect to the statement.

(B) Unless the chief law enforcement officer to whom a statement is transmitted under paragraph (1)(A)(i)(IV) determines that a transaction would violate Federal, State, or local law--

(i) the officer shall, within 20 business days after the date the transferee made the statement on the basis of which the notice was provided, destroy the statement, any record containing information derived from the statement, and any record created as a result of the notice required by paragraph (1)(A)(i)(III);

(ii) the information contained in the statement shall not be conveyed to any person except a person who has a need to know in order to carry out this subsection; and

(iii) the information contained in the statement shall not be used for any purpose other than to carry out this subsection.

(C) If a chief law enforcement officer determines that an individual is ineligible to receive a

handgun and the individual requests the officer to provide the reason for such determination, the officer shall provide such reasons to the individual in writing within 20 business days after receipt of the request.

(7) A chief law enforcement officer or other person responsible for providing criminal history background information pursuant to this subsection shall not be liable in an action at law for damages--

(A) for failure to prevent the sale or transfer of a handgun to a person whose receipt or possession of the handgun is unlawful under this section; or

(B) for preventing such a sale or transfer to a person who may lawfully receive or possess a handgun.

(8) For purposes of this subsection, the term "chief law enforcement officer" means the chief of police, the sheriff, or an equivalent officer or the designee of any such individual.

(9) The Secretary shall take necessary actions to ensure that the provisions of this subsection are published and disseminated to licensed dealers, law enforcement officials, and the public.

(t)(1) Beginning on the date that is 30 days after the Attorney General notifies licensees under section 103(d) of the Brady Handgun Violence Prevention Act that the national instant criminal background check system is established, a licensed importer, licensed manufacturer, or licensed dealer shall not transfer a firearm to any other person who is not licensed under this chapter, unless--

(A) before the completion of the transfer, the licensee contacts the national instant criminal background check system established under section 103 of that Act;

(B)(i) the system provides the licensee with a unique identification number; or

(ii) 3 business days (meaning a day on which State offices are open) have elapsed since the licensee contacted the system, and the system has not notified the licensee that the receipt of a firearm by such other person would violate subsection (g) or (n) of this section; and

(C) the transferor has verified the identity of the transferee by examining a valid identification document (as defined in section 1028(d)(1) of this title) of the transferee containing a photograph of the transferee.

(2) If receipt of a firearm would not violate subsection (g) or (n) or State law, the system shall--

(A) assign a unique identification number to the transfer;

(B) provide the licensee with the number; and

(C) destroy all records of the system with respect to the call (other than the identifying number and

the date the number was assigned) and all records of the system relating to the person or the transfer.

(3) Paragraph (1) shall not apply to a firearm transfer between a licensee and another person if--

(A)(i) such other person has presented to the licensee a permit that--

(I) allows such other person to possess or acquire a firearm; and

(II) was issued not more than 5 years earlier by the State in which the transfer is to take place; and

(ii) the law of the State provides that such a permit is to be issued only after an authorized government official has verified that the information available to such official does not indicate that possession of a firearm by such other person would be in violation of law;

(B) the Secretary has approved the transfer under section 5812 of the Internal Revenue Code of 1986; or

(C) on application of the transferor, the Secretary has certified that compliance with paragraph (1)(A) is impracticable because--

(i) the ratio of the number of law enforcement officers of the State in which the transfer is to occur to the number of square miles of land area of the State does not exceed 0.0025;

(ii) the business premises of the licensee at which the transfer is to occur are extremely remote in relation to the chief law enforcement officer (as defined in subsection (s)(8)); and

(iii) there is an absence of telecommunications facilities in the geographical area in which the business premises are located.

(4) If the national instant criminal background check system notifies the licensee that the information available to the system does not demonstrate that the receipt of a firearm by such other person would violate subsection (g) or (n) or State law, and the licensee transfers a firearm to such other person, the licensee shall include in the record of the transfer the unique identification number provided by the system with respect to the transfer.

(5) If the licensee knowingly transfers a firearm to such other person and knowingly fails to comply with paragraph (1) of this subsection with respect to the transfer and, at the time such other person most recently proposed the transfer, the national instant criminal background check system was operating and information was available to the system demonstrating that receipt of a firearm by such other person would violate subsection (g) or (n) of this section or State law, the Secretary may, after notice and opportunity for a hearing, suspend for not more than 6 months or revoke any license issued to the licensee under section 923, and may impose on the licensee a civil fine of not more than $5,000.

(6) Neither a local government nor an employee of the Federal Government or of any State or local

government, responsible for providing information to the national instant criminal background check system shall be liable in an action at law for damages--

(A) for failure to prevent the sale or transfer of a firearm to a person whose receipt or possession of the firearm is unlawful under this section; or

(B) for preventing such a sale or transfer to a person who may lawfully receive or possess a firearm.

(u) It shall be unlawful for a person to steal or unlawfully take or carry away from the person or the premises of a person who is licensed to engage in the business of importing, manufacturing, or dealing in firearms, any firearm in the licensee's business inventory that has been shipped or transported in interstate or foreign commerce.

(v)(1) It shall be unlawful for a person to manufacture, transfer, or possess a semiautomatic assault weapon.

(2) Paragraph (1) shall not apply to the possession or transfer of any semiautomatic assault weapon otherwise lawfully possessed under Federal law on the date of the enactment of this subsection.

(3) Paragraph (1) shall not apply to--

(A) any of the firearms, or replicas or duplicates of the firearms, specified in Appendix A to this section, as such firearms were manufactured on October 1, 1993;

(B) any firearm that--

(i) is manually operated by bolt, pump, lever, or slide action;

(ii) has been rendered permanently inoperable; or

(iii) is an antique firearm;

(C) any semiautomatic rifle that cannot accept a detachable magazine that holds more than 5 rounds of ammunition; or

(D) any semiautomatic shotgun that cannot hold more than 5 rounds of ammunition in a fixed or detachable magazine.

The fact that a firearm is not listed in Appendix A shall not be construed to mean that paragraph (1) applies to such firearm. No firearm exempted by this subsection may be deleted from Appendix A so long as this subsection is in effect.

(4) Paragraph (1) shall not apply to--

(A) the manufacture for, transfer to, or possession by the United States or a department or agency

of the United States or a State or a department, agency, or political subdivision of a State, or a transfer to or possession by a law enforcement officer employed by such an entity for purposes of law enforcement (whether on or off duty);

(B) the transfer to a licensee under title I of the Atomic Energy Act of 1954 for purposes of establishing and maintaining an on-site physical protection system and security organization required by Federal law, or possession by an employee or contractor of such licensee on-site for such purposes or off-site for purposes of licensee-authorized training or transportation of nuclear materials;

(C) the possession, by an individual who is retired from service with a law enforcement agency and is not otherwise prohibited from receiving a firearm, of a semiautomatic assault weapon transferred to the individual by the agency upon such retirement; or

(D) the manufacture, transfer, or possession of a semiautomatic assault weapon by a licensed manufacturer or licensed importer for the purposes of testing or experimentation authorized by the Secretary.

(w)(1) Except as provided in paragraph (2), it shall be unlawful for a person to transfer or possess a large capacity ammunition feeding device.

(2) Paragraph (1) shall not apply to the possession or transfer of any large capacity ammunition feeding device otherwise lawfully possessed on or before the date of the enactment of this subsection.

(3) This subsection shall not apply to--

(A) the manufacture for, transfer to, or possession by the United States or a department or agency of the United States or a State or a department, agency, or political subdivision of a State, or a transfer to or possession by a law enforcement officer employed by such an entity for purposes of law enforcement (whether on or off duty);

(B) the transfer to a licensee under title I of the Atomic Energy Act of 1954 for purposes of establishing and maintaining an on-site physical protection system and security organization required by Federal law, or possession by an employee or contractor of such licensee on-site for such purposes or off-site for purposes of licensee-authorized training or transportation of nuclear materials;

(C) the possession, by an individual who is retired from service with a law enforcement agency and is not otherwise prohibited from receiving ammunition, of a large capacity ammunition feeding device transferred to the individual by the agency upon such retirement; or

(D) the manufacture, transfer, or possession of any large capacity ammunition feeding device by a licensed manufacturer or licensed importer for the purposes of testing or experimentation authorized by the Secretary.

(4) If a person charged with violating paragraph (1) asserts that paragraph (1) does not apply to such

person because of paragraph (2) or (3), the Government shall have the burden of proof to show that such paragraph (1) applies to such person. The lack of a serial number as described in section 923(i) of this title shall be a presumption that the large capacity ammunition feeding device is not subject to the prohibition of possession in paragraph (1).

(x)(1) It shall be unlawful for a person to sell, deliver, or otherwise transfer to a person who the transferor knows or has reasonable cause to believe is a juvenile--

(A) a handgun; or

(B) ammunition that is suitable for use only in a handgun.

(2) It shall be unlawful for any person who is a juvenile to knowingly possess--

(A) a handgun; or

(B) ammunition that is suitable for use only in a handgun.

(3) This subsection does not apply to--

(A) a temporary transfer of a handgun or ammunition to a juvenile or to the possession or use of a handgun or ammunition by a juvenile if the handgun and ammunition are possessed and used by the juvenile--

(i) in the course of employment, in the course of ranching or farming related to activities at the residence of the juvenile (or on property used for ranching or farming at which the juvenile, with the permission of the property owner or lessee, is performing activities related to the operation of the farm or ranch), target practice, hunting, or a course of instruction in the safe and lawful use of a handgun;

(ii) with the prior written consent of the juvenile's parent or guardian who is not prohibited by Federal, State, or local law from possessing a firearm, except--

(I) during transportation by the juvenile of an unloaded handgun in a locked container directly from the place of transfer to a place at which an activity described in clause (i) is to take place and transportation by the juvenile of that handgun, unloaded and in a locked container, directly from the place at which such an activity took place to the transferor; or

(II) with respect to ranching or farming activities as described in clause (i), a juvenile may possess and use a handgun or ammunition with the prior written approval of the juvenile's parent or legal guardian and at the direction of an adult who is not prohibited by Federal, State or local law from possessing a firearm;

(iii) the juvenile has the prior written consent in the juvenile's possession at all times when a handgun is in the possession of the juvenile; and

(iv) in accordance with State and local law;

(B) a juvenile who is a member of the Armed Forces of the United States or the National Guard who possesses or is armed with a handgun in the line of duty;

(C) a transfer by inheritance of title (but not possession) of a handgun or ammunition to a juvenile; or

(D) the possession of a handgun or ammunition by a juvenile taken in defense of the juvenile or other persons against an intruder into the residence of the juvenile or a residence in which the juvenile is an invited guest.

(4) A handgun or ammunition, the possession of which is transferred to a juvenile in circumstances in which the transferor is not in violation of this subsection shall not be subject to permanent confiscation by the Government if its possession by the juvenile subsequently becomes unlawful because of the conduct of the juvenile, but shall be returned to the lawful owner when such handgun or ammunition is no longer required by the Government for the purposes of investigation or prosecution.

(5) For purposes of this subsection, the term "juvenile" means a person who is less than 18 years of age.

(6)(A) In a prosecution of a violation of this subsection, the court shall require the presence of a juvenile defendant's parent or legal guardian at all proceedings.

(B) The court may use the contempt power to enforce subparagraph (A).

(C) The court may excuse attendance of a parent or legal guardian of a juvenile defendant at a proceeding in a prosecution of a violation of this subsection for good cause shown.

(y) Provisions relating to aliens admitted under nonimmigrant visas--

(1) Definitions.--In this subsection--

(A) the term "alien" has the same meaning as in section 101(a)(3) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(3)); and

(B) the term "nonimmigrant visa" has the same meaning as in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26)).

(2) Exceptions.--Subsections (d)(5)(B), (g)(5)(B), and (s)(3)(B)(v)(II) do not apply to any alien who has been lawfully admitted to the United States under a nonimmigrant visa, if that alien is--

(A) admitted to the United States for lawful hunting or sporting purposes or is in possession of a hunting license or permit lawfully issued in the United States;

(B) an official representative of a foreign government who is--

(i) accredited to the United States Government or the Government's mission to an international organization having its headquarters in the United States; or

(ii) en route to or from another country to which that alien is accredited;

(C) an official of a foreign government or a distinguished foreign visitor who has been so designated by the Department of State; or

(D) a foreign law enforcement officer of a friendly foreign government entering the United States on official law enforcement business.

(3) Waiver--

(A) Conditions for waiver.--Any individual who has been admitted to the United States under a nonimmigrant visa may receive a waiver from the requirements of subsection (g)(5), if--

(i) the individual submits to the Attorney General a petition that meets the requirements of subparagraph (C); and

(ii) the Attorney General approves the petition.

(B) Petition.--Each petition under subparagraph (B) shall--

(i) demonstrate that the petitioner has resided in the United States for a continuous period of not less than 180 days before the date on which the petition is submitted under this paragraph; and

(ii) include a written statement from the embassy or consulate of the petitioner, authorizing the petitioner to acquire a firearm or ammunition and certifying that the alien would not, absent the application of subsection (g)(5)(B), otherwise be prohibited from such acquisition under subsection (g).

(C) Approval of petition.--The Attorney General shall approve a petition submitted in accordance with this paragraph, if the Attorney General determines that waiving the requirements of subsection (g)(5)(B) with respect to the petitioner--

(i) would be in the interests of justice; and

(ii) would not jeopardize the public safety.

APPENDIX A

Centerfire Rifles--Autoloaders

Browning BAR Mark II Safari Semi-Auto Rifle

Browning BAR Mark II Safari Magnum Rifle

Browning High-Power Rifle

Heckler & Koch Model 300 Rifle

Iver Johnson M-1 Carbine

Iver Johnson 50th Anniversary M-1 Carbine

Marlin Model 9 Camp Carbine

Marlin Model 45 Carbine

Remington Nylon 66 Auto-Loading Rifle

APPENDIX D

18 U.S.C. § 924

Title 18, U.S.C. § 924. **Penalties**

(a)(1) Except as otherwise provided in this subsection, subsection (b), (c), or (f) of this section, or in section 929, whoever--

(A) knowingly makes any false statement or representation with respect to the information required by this chapter to be kept in the records of a person licensed under this chapter or in applying for any license or exemption or relief from disability under the provisions of this chapter;

(B) knowingly violates subsection (a)(4), (f), (k), or (q) of section 922;

(C) knowingly imports or brings into the United States or any possession thereof any firearm or ammunition in violation of section 922(l); or

(D) willfully violates any other provision of this chapter,

shall be fined under this title, imprisoned not more than five years, or both.

(2) Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (o) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

(3) Any licensed dealer, licensed importer, licensed manufacturer, or licensed collector who knowingly--

(A) makes any false statement or representation with respect to the information required by the provisions of this chapter to be kept in the records of a person licensed under this chapter, or

(B) violates subsection (m) of section 922,

shall be fined under this title, imprisoned not more than one year, or both.

(4) Whoever violates section 922(q) shall be fined under this title, imprisoned for not more than 5 years, or both. Notwithstanding any other provision of law, the term of imprisonment imposed under this paragraph shall not run concurrently with any other term of imprisonment imposed under any other provision of law. Except for the authorization of a term of imprisonment of not more than 5 years made in this paragraph, for the purpose of any other law a violation of section 922(q) shall be deemed to be a misdemeanor.

(5) Whoever knowingly violates subsection (s) or (t) of section 922 shall be fined under this title, imp isoned for not more than 1 year, or both.

(6)(A)(i) A juvenile who violates section 922(x) shall be fined under this title, imprisoned not more than 1 year, or both, except that a juvenile described in clause (ii) shall be sentenced to probation on appropriate conditions and shall not be incarcerated unless the juvenile fails to

comply with a condition of probation.

(ii) A juvenile is described in this clause if--

(I) the offense of which the juvenile is charged is possession of a handgun or ammunition in violation of section 922(x)(2); and

(II) the juvenile has not been convicted in any court of an offense (including an offense under section 922(x) or a similar State law, but not including any other offense consisting of conduct that if engaged in by an adult would not constitute an offense) or adjudicated as a juvenile delinquent for conduct that if engaged in by an adult would constitute an offense.

(B) A person other than a juvenile who knowingly violates section 922(x)--

(i) shall be fined under this title, imprisoned not more than 1 year, or both; and

(ii) if the person sold, delivered, or otherwise transferred a handgun or ammunition to a juvenile knowing or having reasonable cause to know that the juvenile intended to carry or otherwise possess or discharge or otherwise use the handgun or ammunition in the commission of a crime of violence, shall be fined under this title, imprisoned not more than 10 years, or both.

(7) Whoever knowingly violates section 931 shall be fined under this title, imprisoned not more than 3 years, or both.

(b) Whoever, with intent to commit therewith an offense punishable by imprisonment for a term exceeding one year, or with knowledge or reasonable cause to believe that an offense punishable by imprisonment for a term exceeding one year is to be committed therewith, ships, transports, or receives a firearm or any ammunition in interstate or foreign commerce shall be fined under this title, or imprisoned not more than ten years, or both.

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime--

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection--

(i) is a short-barreled rifle, short-barreled shotgun, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a second or subsequent conviction under this subsection, the person shall--

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law--

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.).

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and--

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

(4) For purposes of this subsection, the term "brandish" means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.

(5) Except to the extent that a greater minimum sentence is otherwise provided under this subsection, or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries

armor piercing ammunition, or who, in furtherance of any such crime, possesses armor piercing ammunition, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime or conviction under this section--

(A) be sentenced to a term of imprisonment of not less than 15 years; and

(B) if death results from the use of such ammunition--

(i) if the killing is murder (as defined in section 1111), be punished by death or sentenced to a term of imprisonment for any term of years or for life; and

(ii) if the killing is manslaughter (as defined in section 1112), be punished as provided in section 1112.

(d)(1) Any firearm or ammunition involved in or used in any knowing violation of subsection (a)(4), (a)(6), (f), (g), (h), (i), (j), or (k) of section 922, or knowing importation or bringing into the United States or any possession thereof any firearm or ammunition in violation of section 922(l), or knowing violation of section 924, or willful violation of any other provision of this chapter or any rule or regulation promulgated thereunder, or any violation of any other criminal law of the United States, or any firearm or ammunition intended to be used in any offense referred to in paragraph (3) of this subsection, where such intent is demonstrated by clear and convincing evidence, shall be subject to seizure and forfeiture, and all provisions of the Internal Revenue Code of 1986 relating to the seizure, forfeiture, and disposition of firearms, as defined in section 5845(a) of that Code, shall, so far as applicable, extend to seizures and forfeitures under the provisions of this chapter: *Provided,* That upon acquittal of the owner or possessor, or dismissal of the charges against him other than upon motion of the Government prior to trial, or lapse of or court termination of the restraining order to which he is subject, the seized or relinquished firearms or ammunition shall be returned forthwith to the owner or possessor or to a person delegated by the owner or possessor unless the return of the firearms or ammunition would place the owner or possessor or his delegate in violation of law. Any action or proceeding for the forfeiture of firearms or ammunition shall be commenced within one hundred and twenty days of such seizure.

(2)(A) In any action or proceeding for the return of firearms or ammunition seized under the provisions of this chapter, the court shall allow the prevailing party, other than the United States, a reasonable attorney's fee, and the United States shall be liable therefor.

(B) In any other action or proceeding under the provisions of this chapter, the court, when it finds that such action was without foundation, or was initiated vexatiously, frivolously, or in bad faith, shall allow the prevailing party, other than the United States, a reasonable attorney's fee, and the United States shall be liable therefor.

(C) Only those firearms or quantities of ammunition particularly named and individually identified as involved in or used in any violation of the provisions of this chapter or any rule or regulation issued thereunder, or any other criminal law of the United States or as intended to be used in any offense referred to in paragraph (3) of this subsection, where such intent is

demonstrated by clear and convincing evidence, shall be subject to seizure, forfeiture, and disposition.

(D) The United States shall be liable for attorneys' fees under this paragraph only to the extent provided in advance by appropriation Acts.

(3) The offenses referred to in paragraphs (1) and (2)(C) of this subsection are--

(A) any crime of violence, as that term is defined in section 924(c)(3) of this title;

(B) any offense punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.) or the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.);

(C) any offense described in section 922(a)(1), 922(a)(3), 922(a)(5), or 922(b)(3) of this title, where the firearm or ammunition intended to be used in any such offense is involved in a pattern of activities which includes a violation of any offense described in section 922(a)(1), 922(a)(3), 922(a)(5), or 922(b)(3) of this title;

(D) any offense described in section 922(d) of this title where the firearm or ammunition is intended to be used in such offense by the transferor of such firearm or ammunition;

(E) any offense described in section 922(i), 922(j), 922(l), 922(n), or 924(b) of this title; and

(F) any offense which may be prosecuted in a court of the United States which involves the exportation of firearms or ammunition.

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection--

(A) the term "serious drug offense" means--

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.), for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that--

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

(f) In the case of a person who knowingly violates section 922(p), such person shall be fined under this title, or imprisoned not more than 5 years, or both.

(g) Whoever, with the intent to engage in conduct which--

(1) constitutes an offense listed in section 1961(1),

(2) is punishable under the Controlled Substances Act (21 U.S.C. 802 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.),

(3) violates any State law relating to any controlled substance (as defined in section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6))), or

(4) constitutes a crime of violence (as defined in subsection (c)(3)),

travels from any State or foreign country into any other State and acquires, transfers, or attempts to acquire or transfer, a firearm in such other State in furtherance of such purpose, shall be imprisoned not more than 10 years, fined in accordance with this title, or both.

(h) Whoever knowingly transfers a firearm, knowing that such firearm will be used to commit a crime of violence (as defined in subsection (c)(3)) or drug trafficking crime (as defined in subsection (c)(2)) shall be imprisoned not more than 10 years, fined in accordance with this title, or both.

(i)(1) A person who knowingly violates section 922(u) shall be fined under this title, imprisoned not more than 10 years, or both.

(2) Nothing contained in this subsection shall be construed as indicating an intent on the part of Congress to occupy the field in which provisions of this subsection operate to the exclusion of State laws on the same subject matter, nor shall any provision of this subsection be construed as invalidating any provision of State law unless such provision is inconsistent with any of the

purposes of this subsection.

(j) A person who, in the course of a violation of subsection (c), causes the death of a person through the use of a firearm, shall--

(1) if the killing is a murder (as defined in section 1111), be punished by death or by imprisonment for any term of years or for life; and

(2) if the killing is manslaughter (as defined in section 1112), be punished as provided in that section.

(k) A person who, with intent to engage in or to promote conduct that--

(1) is punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.);

(2) violates any law of a State relating to any controlled substance (as defined in section 102 of the Controlled Substances Act, 21 U.S.C. 802); or

(3) constitutes a crime of violence (as defined in subsection (c)(3)),

smuggles or knowingly brings into the United States a firearm, or attempts to do so, shall be imprisoned not more than 10 years, fined under this title, or both.

(l) A person who steals any firearm which is moving as, or is a part of, or which has moved in, interstate or foreign commerce shall be imprisoned for not more than 10 years, fined under this title, or both.

(m) A person who steals any firearm from a licensed importer, licensed manufacturer, licensed dealer, or licensed collector shall be fined under this title, imprisoned not more than 10 years, or both.

(n) A person who, with the intent to engage in conduct that constitutes a violation of section 922(a)(1)(A), travels from any State or foreign country into any other State and acquires, or attempts to acquire, a firearm in such other State in furtherance of such purpose shall be imprisoned for not more than 10 years.

(o) A person who conspires to commit an offense under subsection (c) shall be imprisoned for not more than 20 years, fined under this title, or both; and if the firearm is a machinegun or destructive device, or is equipped with a firearm silencer or muffler, shall be imprisoned for any term of years or life.

FEDERAL PUBLIC DEFENDER
Middle District of Florida

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February 14, 2006

William K. Suter
Office of the Clerk
Supreme Court of the United States
One First Street, N.E.
Washington, D.C. 20543

Re: Alphonso James, Jr. v. United States of America

Dear Mr. Suter:

Enclosed is the *Petition for Writ of Certiorari*, the *Motion for Leave to Proceed in Forma Pauperis*, and the *Certificate of Service*, for filing on behalf of the petitioner.

Sincerely,

Craig L. Crawford
Assistant Federal Public Defender

CLC/cim

Enclosures

cc: *Office of the Solicitor General*
Karin B. Hoppmann, Assistant United States Attorney, Tampa Division
Alphonso James, Jr.

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BEST AVAILABLE COPY

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2005

ALPHONSO JAMES, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY, pursuant to Supreme Court Rule 29.5(b), that on this 14day of February 2006, true copies of the *Petition for Writ of Certiorari* and the Mon for Leave to Proceed *In Forma Pauperis* were sent by Federal Express stand overnight to the Office of the Solicitor General of the United States, Room 5712epartment of Justice, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530001 (Respondent); Karin B. Hoppmann, Assistant United States Attorney, Unitdates Attorney's Office, 400 N. Tampa Street, Suite 3200, Orlando, FL

RESPONSE REQUESTED

ORIGINAL

Supreme Court, U.S.
FILED
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No. 05-9264

IN THE SUPREME COURT OF THE UNITED STATES

ALPHONSO JAMES, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Florida state law offense of drug trafficking by possessing between 200 and 400 grams of cocaine is a "serious drug offense" under the Armed Career Criminal Act, 18 U.S.C. 924(e).

2. Whether the Florida state law offense of attempted burglary is a "violent felony" under 18 U.S.C. 924(e).

3. Whether the felon-in-possession statute, 18 U.S.C. 922(g)(1), exceeds Congress's authority under the Commerce Clause.

IN THE SUPREME COURT OF THE UNITED STATES

No. 05-9264

ALPHONSO JAMES, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A6) is published at 430 F.3d 1150.

JURISDICTION

The judgment of the court of appeals was entered on November 17, 2005. The petition for a writ of certiorari was filed on February 14, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner pleaded guilty in the United States District Court for the Middle District of Florida to one count of possessing a

firearm after having been convicted of a felony, in violation of 18 U.S.C. 922(g)(1). He was sentenced to 71 months of imprisonment. The government appealed the sentence and petitioner cross-appealed. The court of appeals vacated petitioner's sentence and remanded for the imposition of a higher sentence pursuant to the Armed Career Criminal Act (ACCA), 18 U.S.C. 924(e). Pet. App. A2.

1. In June 2003, a grand jury in the Middle District of Florida returned an indictment charging petitioner with one count of possessing a firearm after having been convicted of a felony, in violation of 18 U.S.C. 922(g)(1). Gov't C.A. Br. 2. Petitioner pleaded guilty based on his possession of a .380-caliber semi-automatic pistol and ammunition. Id. at 3; see Pet. App. A2.

The probation office recommended that petitioner be sentenced as an armed career criminal under the ACCA, which imposes a mandatory minimum 15-year term of imprisonment on any person who violates 18 U.S.C. 922(g) after being convicted on three previous occasions of a "violent felony" or "serious drug offense." 18 U.S.C. 924(e)(1); see Gov't C.A. Br. 3. The definition of a "violent felony" includes any crime that is punishable by more than one year in prison and that "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(B)(ii). The definition of a "serious drug offense" includes offenses under state law that "involv[e]

manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance," and that are punishable by a maximum term of imprisonment of ten years or more. 18 U.S.C. 924(e)(2)(A)(ii).

Petitioner had three prior convictions. In 1994, petitioner was convicted in a Florida state court of attempted burglary of a dwelling, after throwing a hammer through the window of a residence occupied by a man and his 19-month-old daughter. In 1996, petitioner was convicted in a Florida state court of drug trafficking for the sale, delivery, or manufacture of at least 28 grams of cocaine. In 1997, petitioner was convicted in Florida state court of drug trafficking for the possession of between 200 and 400 grams of cocaine. Gov't C.A. Br. 2-3.

The district court held that petitioner did not qualify for the enhanced sentence provided by the ACCA. The court agreed with the government that attempted burglary under Florida law is a "violent felony" under 18 U.S.C. 924(e). It decided, however, that petitioner's 1997 drug trafficking conviction was not for a "serious drug offense" because Florida law did not require as an element of proof that petitioner intended to distribute his 200 to 400 grams of cocaine. The court sentenced petitioner to 71 months of imprisonment, to be followed by 36 months of supervised release. Pet. App. A2.

2. The government appealed the sentence, and petitioner

cross-appealed. The court of appeals vacated petitioner's sentence and ordered the district court to sentence petitioner in accordance with the ACCA. Pet. App. A1-A6.

The court of appeals agreed with the government that the district court erred by not counting petitioner's Florida state conviction for trafficking by possessing between 200 and 400 grams of cocaine as a "serious drug offense" under the ACCA. Pet. App. A3-A5. The court explained that the ACCA defines a "serious drug offense" to include any state offense "involving" the intent to distribute, not only those offenses having "as an element" such intent. Id. at A4. Analyzing the Florida statutory scheme, the court explained that Florida divides drug possession crimes into three tiers, possession, possession with intent to distribute, and trafficking, and that petitioner was convicted of the last, most serious offense. Ibid. Because the trafficking offense "infers an intent to distribute once a defendant possesses a certain amount of drugs" -- here, between 200 and 400 grams of cocaine -- the court concluded that the offense involves intent to distribute and is thus a serious drug offense under the ACCA. Ibid. (quoting United States v. Madera-Madera, 333 F.3d 1228, 1232 (11th Cir.), cert. denied, 540 U.S. 1026 (2003)).

The court of appeals also rejected petitioner's contention that attempted burglary under Florida law is not a "violent felony" under the ACCA. Pet. App. A5-A6. The court explained that

"attempted burglary presents a serious potential risk of physical injury to another. An uncompleted burglary does not diminish the potential risk of physical injury." Id. at A5 (quoting U.S.S.G. § 4B1.1(a)(2)).

Finally, the court of appeals declined to consider petitioner's challenge to the constitutionality of 18 U.S.C. 922(g) because petitioner raised that claim for the first time on appeal. Pet. App. A2-A3 n.1.

ARGUMENT

Petitioner argues that he should not be sentenced under the ACCA because drug trafficking under Florida law is not a "serious drug offense" (Pet. 5-8) and attempted burglary under Florida law is not a "violent felony" (Pet. 9-14) for purposes of the ACCA. Petitioner also contends (Pet. 15-22) that the felon-in-possession statute, 18 U.S.C. 922(g)(1), exceeds Congress's authority under the Commerce Clause. None of those claims merits further review.

1. The court of appeals correctly held that petitioner's violation of Florida's law against drug trafficking is a serious drug offense under the ACCA. Pet. App. A3-A5. The ACCA defines the term "serious drug offense" to include offenses under state law that "involv[e] manufacturing, distributing, or possessing with intent to manufacture or distribute" a controlled substance and that are punishable by a maximum term of imprisonment of ten years or more. 18 U.S.C. 924(e)(2)(A)(ii).

As the court of appeals explained, Florida generally divides drug possession crimes into three tiers: (1) possession of any amount of a controlled substance, Fla. Stat. § 893.13(6)(a); (2) possession with intent to distribute a controlled substance, Fla. Stat. § 893.13(1)(a); and (3) "trafficking" in a controlled substance, which includes possessing, selling, or manufacturing at least a minimum amount of the drug, Fla. Stat. § 893.135. Pet. App. A4. For cocaine trafficking, the threshold amount is 28 grams. Fla. Stat. § 893.135(1)(b). Petitioner was convicted of trafficking based on his possession of between 200 and 400 grams of cocaine. Pet. App. A3.

Consistent with this Court's admonition that sentencing under the ACCA requires a "categorical approach" that looks to the statutory definition of an offense "and not to the particular facts underlying th[e] conviction[]," Taylor v. United States, 495 U.S. 575, 600 (1990), the court of appeals correctly concluded that "Florida's drug trafficking statute 'infers an intent to distribute once a defendant possesses a certain amount of drugs,'" and that the drug trafficking offense therefore involves possession with intent to distribute for purposes of the ACCA. Pet. App. A4 (quoting United States v. Madera-Madera, 333 F.3d 1228, 1232 (11th Cir.), cert. denied, 540 U.S. 1026 (2003)).

The court of appeals emphasized that, under the Florida scheme, "the defendant must be in possession of a significant

quantity of drugs, namely 28 grams, before the state deems the offense to be 'trafficking.'" Pet. App. A4. It is well settled that possession of a large amount of drugs can demonstrate beyond a reasonable doubt the intent to distribute those drugs. See, e.g., id. at A5; Madera-Madera, 333 F.3d at 1233; United States v. Franklin, 728 F.2d 994, 998-999 (8th Cir. 1984) (collecting cases from other circuits). Under Florida law, "drug trafficking is a more serious offense, and is punished more harshly, than either simple possession or possession with intent to distribute." Pet. App. A4. Thus, "[t]o hold that this conviction does not qualify as a 'serious drug offense' for purposes of the ACCA enhancement would create an anomaly" by allowing a Florida conviction for the lesser crime of possession with intent to distribute to qualify as a predicate felony under the ACCA, while exempting more serious "trafficking" crimes from the reach of the ACCA. Ibid.[1]

Petitioner argues (Pet. 7) that his offense did not involve drug trafficking because the Florida Supreme Court held in Gibbs v. State, 698 So. 2d 1206, 1208-1209 (1997), that intent to distribute is not an element of the trafficking offense. Under the ACCA, however, the definition of a serious drug offense does not turn on

---

[1] The district court recognized the same "anomaly" by noting that, under its view that drug trafficking is not a serious drug offense under Florida law for purposes of the ACCA, petitioner's guilty plea to a greater offense in state court entitled him to more lenient treatment under the ACCA. Pet. App. A4; Gov't C.A. Br. 4.

whether intent to distribute is an element of the offense that must separately be proven to secure a conviction, but instead on whether the offense "involv[es]" intent to distribute. Pet. App. A4. Immediately after defining the term "serious drug offense" to include offenses "involving" intent to distribute, Section 924(e) defines the term "violent felony" to include "any crime punishable by imprisonment for a term exceeding one year * * * [that] has as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. 924(e)(2)(B)(i) (emphasis added). Congress's use of the disparate phrases "involving" and "has as an element" within the same statute demonstrates that it did not intend the two phrases to have the same meaning. See, e.g., Russello v. United States, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acted intentionally and purposely in the disparate inclusion or exclusion.") (internal quotation marks and citation omitted).

There is no conflict between the decision below and Gibbs because Gibbs interpreted state law for purposes of a double jeopardy challenge, 698 So. 2d at 1208-1209, and did not address the distinct question of federal law arising under the ACCA. Cf. Taylor, 495 U.S. at 590-591 (definition of "burglary" for purposes of the ACCA is a matter of federal law); Dickerson v. New Banner

Inst., 460 U.S. 103, 111-112 (1983) (definition of "convicted" for purposes of gun control statutes is "necessarily" a question of "federal, not state, law, despite the fact that the predicate offense and its punishment are defined by the law of the State"); United States v. Nardello, 393 U.S. 286, 293-294 (1969) (definition of "extortion" in Travel Act is a question of federal law). Petitioner does not contend that the court of appeals' decision conflicts with any decision of any court on the federal law question presented here.

2. Nor did the court of appeals err by holding that the Florida offense of attempted burglary is a "violent felony" under the ACCA because it involves conduct that presents a serious potential risk of physical injury to another. Pet. App. A5-A6. The Eighth Circuit reached precisely the same conclusion about the Florida attempted burglary offense in United States v. Demint, 74 F.3d 876, 877-878 (1996). This Court declined to review the decision in Demint, see 519 U.S. 951 (1996), and there is no reason for a different result in this case.

a. The ACCA specifically enumerates some offenses that qualify as violent felonies, such as burglary and arson. 18 U.S.C. 924(e)(B)(ii). The ACCA also provides that an unenumerated offense qualifies if it "involves conduct that presents a serious potential risk of physical injury to another." Ibid. This Court recognized in Taylor that burglary carries an "inherent potential for harm to

persons." 495 U.S. at 588. The court of appeals correctly held that attempted burglary under Florida law likewise "presents a serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(B)(ii). See Pet. App. A5-A6.

Burglary under Florida law requires "entering or remaining in a dwelling, a structure, or a conveyance with the intent to commit an offense therein." Fla. Stat. § 810.02(1)(a). Under Florida law, attempted burglary "requires proof of (1) specific intent to commit burglary and (2) 'any overt act reasonably calculated to accomplish the commission of the offense intended, going beyond mere preparation but falling short of accomplishing the crime intended.'" Demint, 74 F.3d at 878 (quoting Ellis v. State, 425 So. 2d 201, 202 (Fla. App.), aff'd, 442 So. 2d 213 (Fla. 1983)). Petitioner criticizes (Pet. 13) Demint for citing "older Florida cases" and not discussing Jones v. State, 608 So. 2d 797, 798 (Fla. 1992). But in briefly describing the elements of attempted burglary in the course of considering a double jeopardy issue, the Jones Court relied on Gustine v. State, 97 So. 207, 208 (Fla. 1923), which makes clear that proof of attempted burglary in Florida requires proof of specific intent as well as "an overt act apparently adapted to effect that intent, carried beyond mere preparation, but falling short of execution of the ultimate design." Id. at 208 (emphasis added). Jones further clarifies that Florida law requires an overt act "directed toward entering or

remaining in a structure or conveyance." 608 So. 2d at 799. Even entering a neighborhood with burglary tools for the purpose of committing a burglary does not constitute attempted burglary in Florida. See ibid. (stating, about a defendant who had been arrested while fleeing a residential area with a pair of socks over his hands and carrying a screwdriver, that "it is obvious that [the defendant] could not have been convicted of attempted burglary").

Because attempted burglary under Florida law requires far more than mere preparation, and instead requires an overt act directed toward entering a building, the court of appeals correctly recognized that under Florida law, "an attempt to commit burglary, like an attempt to commit arson, presents the potential risk of physical injury to another sufficient to satisfy the ACCA's definition of a 'violent felony.'" Pet. App. A6. That conclusion is valid for all Florida attempted burglary convictions under Taylor's categorical approach. See 495 U.S. at 600. But petitioner's own conviction certainly casts no doubt on that conclusion. Petitioner was convicted for throwing a hammer through the window of a residence occupied by a man and his 19-month-old daughter. Gov't C.A. Br. 2.

b. Petitioner argues (Pet. 11-14) that the courts of appeals are in conflict over whether attempted burglary is a violent felony under the ACCA. The Eighth Circuit is, however, the only other court of appeals to consider the question whether attempted

burglary under Florida law is a violent felony under the ACCA, and the Eighth Circuit agreed with the court of appeals here that attempted burglary under Florida law is a violent felony. See Demint, 74 F.3d at 877-878.

Most of the other courts of appeals that have considered the question have agreed that, under the laws of various other States, attempted burglary and attempted breaking and entering are violent felonies for purposes of the ACCA, and in most of those cases this Court's review was sought and denied. See United States v. Bureau, 52 F.3d 584, 591-593 (6th Cir. 1995) (Tennessee law); United States v. Davis, 16 F.3d 212, 219-221 (7th Cir.) (Illinois law), cert. denied, 513 U.S. 945 (1994); United States v. Andrello, 9 F.3d 247, 249-250 (2d Cir. 1993) (New York law), cert. denied, 510 U.S. 1137 (1994); United States v. Solomon, 998 F.2d 587, 589-590 (8th Cir.) (Minnesota law), cert. denied, 510 U.S. 1026 (1993); United States v. O'Brien, 972 F.2d 47, 51-52 (3d Cir. 1992) (Massachusetts law), cert. denied, 510 U.S. 875 (1993); United States v. Payne, 966 F.2d 4, 8-9 (1st Cir. 1992) (Massachusetts law); United States v. Fish, 928 F.2d 185, 188 (6th Cir.) (Michigan law), cert. denied, 502 U.S. 834 (1991); United States v. Lane, 909 F.2d 895, 903 (6th Cir. 1990) (Ohio law), cert. denied, 498 U.S. 1093 (1991).

Three other courts of appeals have held that attempted burglary, as defined by the laws of other States, is not a violent felony. See United States v. Weekley, 24 F.3d 1125, 1126-1127 (9th

Cir. 1994) (Washington law); United States v. Permenter, 969 F.2d 911, 914-915 (10th Cir. 1992) (Oklahoma law; following United States v. Strahl, 958 F.2d 980, 986 (10th Cir. 1992), which involved Utah law); United States v. Martinez, 954 F.2d 1050, 1053-1054 (5th Cir. 1992) (Texas law). Those cases do not, however, create a conflict warranting this Court's review. Because the ACCA requires reference to the elements of state law offenses, see Taylor, 495 U.S. at 602, attempted burglary as defined by one State's law may present a serious potential risk of physical injury while attempted burglary under the law of another State may not.

Indeed, the courts of appeals that have held attempted burglaries to be violent felonies under the laws of various States have generally distinguished the state laws at issue in Weekley, Permenter, or Martinez for that reason, and have explained that the laws of those States (unlike Florida) did not require conduct that was sufficient to give rise to a serious potential risk of physical injury to another. See, e.g., Demint, 74 F.3d at 878; Bureau, 52 F.3d at 593; Davis, 16 F.3d at 218; Andrello, 9 F.3d at 250; Solomon, 998 F.2d 590; O'Brien, 972 F.2d at 52; Payne, 966 F.2d at 9. In Weekley, the Ninth Circuit likewise recognized that the question turns on the interpretation of state law, and that the courts of appeals that had held attempted burglary to be a violent felony had construed the underlying state laws differently than it construed Washington law in concluding that the Washington offense

was not a violent felony. 24 F.3d at 1127 & n.2. The proper characterization of Florida law for this purpose does not warrant this Court's review. Cf. Salve Regina College v. Russell, 499 U.S. 225, 235 n.3 (1991) (describing "several cases in which this Court declined to review de novo questions of state law" as resting on "the manner in which this Court chooses to expend its limited resources").

3. Petitioner argues (Pet. 15-22) that the felon-in-possession statute, 18 U.S.C. 922(g)(1), is unconstitutional either facially or as applied to him because it exceeds Congress's authority under the Commerce Clause, which authorizes Congress to regulate commerce "with foreign Nations, and among the Several States, and with the Indian Tribes." U.S. Const., Art. 1, § 8, cl. 3. Because petitioner failed to raise that claim in the district court, the court of appeals declined to address it. Pet. App. A2-A3 n.1. This Court does not ordinarily review questions that were neither properly presented nor passed upon below. Adickes v. S.H. Kress & Co., 398 U.S. 144, 147 n.2 (1970). Although petitioner argues (Pet. 17 n.7) that his claim should be considered under the plain-error standard of review, petitioner not only failed to raise his challenge in the district court, he also pleaded guilty to a violation of the statute he now seeks to challenge. Pet. App. A2. Even assuming that petitioner's challenge to his conviction could be reviewed for plain error in that circumstance, there was no

error, much less clear or obvious error, in this case. See United States v. Olano, 507 U.S. 725, 734 (1993).

a. The felon-in-possession statute makes it unlawful for any felon "to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." 18 U.S.C. 922(g)(1). Petitioner argues (Pet. 15-17) that the possession prong of the statute is unconstitutional because the term "commerce" in the phrase "in or affecting commerce" is not limited to interstate or foreign commerce. That argument is refuted by this Court's decision in Scarborough v. United States, 431 U.S. 563 (1977), which interprets the statutory phrase "in or affecting commerce" as reflecting Congress's intent to assert its full Commerce Clause power, and therefore requiring "the minimal nexus that the firearm have been, at some time, in interstate commerce." Id. at 571, 575. Scarborough interpreted a predecessor of the current felon-in-possession statute, 18 U.S.C. App. 1202(a) (1970), which made it unlawful for any person convicted of a felony to "receive[], possess[], or transport[] in commerce or affecting commerce * * * any firearm." 431 U.S. at 564. Thus, Scarborough is controlling.

Petitioner nonetheless argues (Pet. 17-22) that Section 922(g) is unconstitutional under United States v. Lopez, 514 U.S. 549

(1995), because it does not require a "substantial" effect on interstate commerce. Petitioner contends (Pet. 20) that a firearm's previous transportation in interstate commerce is an insufficient basis for regulation of its subsequent possession because it does not establish a substantial nexus to interstate commerce.

In Lopez, this Court held that the Gun-Free School Zones Act of 1990, 18 U.S.C. 922(q) (1994), which prohibited the possession of a firearm within a school zone, exceeded Congress's power under the Commerce Clause. 514 U.S. at 551. The Court observed that Section 922(q) neither regulated commercial activity nor contained an express jurisdictional element that required the government to show in each individual case that the prohibited conduct was connected to interstate commerce. See 541 U.S. at 561-562. Significantly, the Court expressly distinguished the statute at issue in Scarborough because that statute "contain[ed] [a] jurisdictional element which * * * ensure[d], through case-by-case inquiry, that the firearm possession in question affect[ed] interstate commerce." 514 U.S. at 562.

Lopez thus casts no doubt on Scarborough and the constitutionality of Section 922(g). Unlike Section 922(q), the felon-in-possession statute contains a jurisdictional element that requires a showing of an effect on interstate commerce in each case. 18 U.S.C. 922(g). That element limits the statute's reach

to "a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce." Lopez, 514 U.S. at 562. In this case, it is undisputed that the firearm was manufactured in another state, and then traveled in interstate commerce to Florida. Pet. 20; PSR ¶ 7.

b. As petitioner acknowledges (Pet. 17-18), there is no conflict among the circuits on the constitutionality of Section 922(g). Since this Court's decision in Lopez, the courts of appeals have uniformly sustained Section 922(g) as a permissible exercise of congressional authority under the Commerce Clause, and this Court has repeatedly denied review. See, e.g., United States v. Weems, 322 F.3d 18, 26 (1st Cir.), cert. denied, 540 U.S. 892 (2003); United States v. Santiago, 238 F.3d 213, 215-217 (2d Cir.), cert. denied, 532 U.S. 1046 (2001); United States v. Singletary, 268 F.3d 196, 198-205 (3d Cir. 2001), cert. denied, 535 U.S. 976 (2002); United States v. Henry, 288 F.3d 657, 664 n.5 (5th Cir.), cert. denied, 537 U.S. 902 (2002); United States v. Carnes, 309 F.3d 950, 954 (6th Cir. 2002), cert. denied, 537 U.S. 1240 (2003); United States v. Wesela, 223 F.3d 656, 659-660 (7th Cir. 2000), cert. denied, 531 U.S. 1174 (2001); United States v. Stuckey, 255 F.3d 528, 529-530 (8th Cir. 2000), cert. denied, 534 U.S. 1011 (2001); United States v. Davis, 242 F.3d 1162, 1162-1163 (9th Cir.), cert. denied, 534 U.S. 878 (2001); United States v. Dorris, 236 F.3d 582, 584-586 (10th Cir. 2000), cert. denied, 532 U.S. 986

(2001). There is no reason for a different result here.[2]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General

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MAY 2006

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[2] Petitioner's reliance (Pet. 20-21) on United States v. Denalli, 73 F.3d 328 (11th Cir.), amended in part, 90 F.3d 444 (1996), and United States v. Pappadopoulous, 64 F.3d 522 (9th Cir. 1995), is misplaced. Those cases, as well as this Court's decision in Jones v. United States, 529 U.S. 848, 850-851 (2000), held that an owner-occupied residence not used for any commercial purpose is outside the reach of the federal arson statute, 18 U.S.C. 844(i), which requires that the targeted building be "used in" interstate commerce or in any activity affecting interstate commerce. See Jones, 529 U.S. at 850-851. This Court explained that the "key word" in the statute is "used," and that term is "most sensibly read to mean active employment for commercial purposes, and not merely a passive, passing, or past connection to commerce." Id. at 854-855. The Court then concluded that Section 844(i) was not intended to invoke Congress's "full authority under the Commerce Clause," as might have been the case if Congress had simply used the phrase "affecting commerce," without qualification. 529 U.S. at 854. In contrast to the arson statute, Section 922(g) does reach conduct "affecting commerce," without qualification.

No. 05-9264

IN THE SUPREME COURT OF THE UNITED STATES

ALPHONSO JAMES, JR., PETITIONER

v.

UNITED STATES OF AMERICA

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served with copies of the **BRIEF FOR THE UNITED STATES IN OPPOSITION,** via e-mail and first-class mail, postage prepaid, this **8th day of May, 2006**.

[See Attached Service List]

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May 8, 2006

Due to the continuing delay in receiving incoming mail at the Department of Justice, in addition to mailing your brief via first-class mail, we would appreciate a fax or email copy of your brief. If that is acceptable to you, please fax your brief to Emily C. Spadoni, Supervisor Case Management, Office of the Solicitor General, at (202) 514-8844, or email at **SupremeCtBriefs@USDOJ.gov.** Ms. Spadoni's direct dial phone number is (202) 514-2217 or 2218. Thank you for your consideration of this request.

05-9264
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No. 05-9264

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2005

ALPHONSO JAMES, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY TO BRIEF IN OPPOSITION

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REASONS FOR GRANTING THE PETITION

Issue I

The Eleventh Circuit erred by holding that a state drug conviction, which did not necessarily involve manufacturing, distributing, or possessing with intent to manufacture or distribute, qualified as a serious drug offense under 18 U.S.C. § 924(e), in violation of *Taylor v. United States*, 495 U.S. 575 (1990), and *Shepard v. United States*, 544 U.S. 13 (2005).

In its brief in opposition, the government argues that Mr. James' Florida state conviction for possession of 200 to 400 grams of cocaine was a serious drug offense under 18 U.S.C. § 924(e). *See* Brief in Opposition at 5-9. Mr. James submits that the government's argument is contrary to this Court's decision in *Taylor v. United States*, 495 U.S. 575 (1990), and the applicable state statute, as interpreted by the Florida Supreme Court. As such, this Court should grant the petition.

In *Taylor*, this Court stated that in deciding whether a crime qualifies under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), a sentencing court should look to the statutory definition of the crime charged, rather than the actual facts of the individual's prior conviction. *Taylor*, 495 U.S. at 600-602. This categorical approach, which is consistent with the statutory language as well as the legislative history of the ACCA, is designed to avoid "the practical difficulties and potential unfairness of a factual approach" to each prior conviction, *see id.* at 601, as well as Sixth Amendment problems. *See Shepard v. United States,* 544 U.S. 13 (2005).

The government is implicitly asking this Court to ignore the categorical approach mandated in *Taylor*. Rather than looking at the statutory definition of the

crime charged, the government is asking this Court to look at the actual facts of Mr. James' prior conviction. Specifically, Mr. James' prior conviction was for possession of 200 to 400 grams of cocaine. Nothing in the statute to which Mr. James was convicted required implicitly or explicitly that the cocaine be possessed with the intent to manufacture or distribute. Although Mr. James was convicted of mere possession of cocaine, the government seeks to alter Mr. James' prior conviction, by reading into the statute that the offense involved possession with intent to manufacture or distribute.

Such an interpretation of the statute clearly violates this Court's mandate that a categorical approach be used to decide whether the offense qualifies under the ACCA. Additionally, the government's interpretation specifically contradicts the Florida Supreme Court's interpretation of the statute. In *Gibbs v. State*, 698 So.2d 1206, 1206 (Fla. 1997), the Florida Supreme Court was asked to address whether a person could be separately convicted and punished for trafficking possession of cocaine and simple possession of a controlled substance for the same quantity of cocaine. The Florida Supreme Court held that the elements in the statute prohibiting trafficking possession were not different from the elements in the statute prohibiting simple possession. *Id.* at 1208-1209. By so holding, the Court found that the quantity requirement of trafficking possession was not a separate element, thus, the State was not allowed the dual prosecution of both trafficking possession and simple possession arising out of the possession of the same cocaine. *Id.* at 1209. Additionally, the Court stated that "the gravamen of the crime underlying each statute is the possession of an illegal drug." *Id.*

More important, however, the Court stated that:

> The conduct element of the drug trafficking statute is not compared by considering the entire range of conduct including possession, sale, purchase, and delivery, but rather by comparing only trafficking possession with simple possession. This is a different situation from a case in which the defendant is charged with both trafficking sale and simple possession, because the sale element of the trafficking statute differs from the elements in the simple possession statute.

Id. at 1209-1210. The Florida Supreme Court clearly indicates that trafficking possession in Florida **does not** involve distribution or manufacture, or the possession with intent to distribute or manufacture.

The government asks this Court to ignore the Florida Supreme Court's interpretation of the statute in question. Although this Court stated in *Taylor* that the definition of a qualifying state offense under the ACCA is a matter of federal law, *see Taylor*, 495 U.S. at 590-591, that does not equate with totally ignoring how the state offense is interpreted by the highest court within that state. For example, although the Florida Supreme Court could not rule, consistent with *Taylor*, that trafficking possession in Florida is or is not a serious drug offense under the ACCA, the Florida Supreme Court has clearly and unequivocally held that a trafficking possession conviction in Florida does not need to involve distribution or manufacture, or the possession with intent to distribute or manufacture. A federal court must accept the Florida Supreme Court's interpretation of its own state statute.

Although the possession of a large quantity of drugs might lead to an inference that the person intended to distribute or manufacture the drugs, Florida law does not require the inference as a matter of law. Under the categorical approach required under *Taylor*, and because the government failed to provide any admissible documents that Mr. James' drug conviction really did involve the manufacturing, distributing, or possessing with intent to manufacture or distribute cocaine, Mr.

James' drug conviction was not a serious drug offense under the ACCA.

Issue II

The Eleventh Circuit erred by holding that all convictions in Florida for attempted burglary qualify as a violent felony under 18 U.S.C. § 924(e), creating a circuit conflict on the issue.

In stark contrast to the possession of cocaine conviction in the previous section, the government asks this Court to look to state law to determine whether Mr. James prior attempted burglary conviction qualifies under the ACCA. Mr. James submits that an examination of circuit law alone establishes the need for certiorari review. However, for the reasons that follow, an examination of state law bolsters Mr. James' claim that his Florida attempted burglary conviction does not qualify under the ACCA. At a minimum, an examination of state law conclusively demonstrates that a circuit conflict exists on whether an attempted burglary conviction qualifies under the ACCA.

In its brief, the government states that criminal attempts in Florida are different from criminal attempts in Washington, Utah, Oklahoma, and Texas. *See* Government Brief in Opposition at 10-13. Surprisingly, the government makes this bold statement without actually comparing and contrasting the statutes/laws in question. A comparison shows that Florida's criminal attempt law is similar to the laws in Washington, Utah, Oklahoma, and Texas. In fact, for the reasons that follow, Mr. James submits that the laws in Washington and Utah are closer to qualifying under the ACCA than the law in Florida. In Florida, the elements of attempted burglary are (1) the intent to commit burglary, and (2) some overt act directed toward its commission. *See Jones v. State*, 608 So.2d 797, 798 (Fla. 1992).

Washington defines the crime of attempt as follows: (1) the intent to commit a specific crime; and (2) a substantial step toward the commission of that crime. *See State v. Vermillion*, 832 P.2d 95, 101 (Wash. Ct. App. 1992); *United States v. Weekley*, 24 F.3d 1125, 1127 (9th Cir. 1994). Utah similarly requires the intent to commit the crime and a substantial step toward the commission if the crime. *See* Utah Code Ann. § 76-4-101; *State v. Pearson*, 680 P.2d 406, 407-408 (Utah 1984); *United States v. Strahl*, 958 F.2d 980, 986 (10th Cir. 1992). Both Washington and Utah require a substantial step toward the commission of the offense - a higher standard than some overt act directed toward the commission of the offense, as required in Florida.[1] The Oklahoma attempt statute provides: "Every person who attempts to commit any crime, and in such attempt does any act toward the commission of such crime, but fails, or is prevented or intercepted in the perpetration thereof . . . ." Okla. Stat. tit. 21, § 42 (1991); *United States v. Permenter*, 969 F.2d 911, 913 (10th Cir. 1992). Texas similarly provides that an attempt burglary is any act amounting to more than mere preparation that tends but fails to effect a burglary. *United States v. Martinez*, 954 F.2d 1050, 1053 (5th Cir. 1992); *Molenda v. State*, 715 S.W.2d 651, 653 (Tex. Crim. App. 1986); Tex. Penal Code Ann. §§ 15.01, 30.02.

In contrast to these laws, including Florida, other circuits have dealt with laws requiring the step to come within dangerous proximity to completion. *See, e.g., United States v. Davis*, 16 F.3d 212, 218 (7th Cir. 1994) (interpreting the Illinois statute to require "dangerous proximity to success" to be convicted under the attempt

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[1]Webster's Ninth Collegiate Dictionary (1983) defines "substantial" as important or essential. Webster's Ninth Collegiate Dictionary (1983) defines "overt" as "to open to view."

statute); *United States v. Payne*, 966 F.2d 4, 9 (1st Cir. 1992) (interpreting Massachusetts breaking-and-entering law to require that the defendant came close enough to premises to risk confrontation). *See also, Weekley*, 24 F.3d at 1127 n.2 (discussing various circuit's interpretation of state laws).

The government also makes a bold and incorrect statement that Florida law requires "**far** more than mere preparation." Government Brief in Opposition at 11. It is unclear how the government makes such an assertion (especially as it cites no case law in support of the assertion), as no case from Florida, nor the statute, has ever used the phrase "far more than mere preparation." Some Florida cases, including the case cited by the government, *Gustine v. State*, 97 So. 207 (Fla. 1923)(dealing with an attempted theft of a car), mention the phrase "beyond mere preparation." Specifically, the *Gustine* court defined an attempt as:

> **Generally**, there must be an intent to commit a crime, coupled with an overt act apparently adapted to effect that intent, carried beyond mere preparation, but falling short of execution of the ultimate design.

Id. at 208 (emphasis added). The Florida Supreme Court, in 1923, cited various sources, including Bouvier's Law Dict. (3d Rev.) vol. 1, title "Attempt," as a source for the definition. The court did not cite to any Florida case law or statute as a source for the definition. Whereas, in *Jones*, the Florida Supreme Court cited specifically to § 777.04(1), Fla. Stat., as its primary source for the definition of attempt. *Jones*, 608 So.2d at 798. Moreover, the Court cited to the Florida Standard Jury Instructions in Criminal Cases in further defining the crime of attempt: "(Defendant) did some act toward committing the crime of (crime attempted) **that went beyond just thinking or talking about it**. . . ." *Id.* (quoting Fla. Std. Jury Instr. (Crim.) at 55)(emphasis added).

Even assuming the *Gustine* definition of attempt applies in Florida, Utah has interpreted the requirement of its substantial step as something "more than mere preparation." *State v. Johnson*, 821 P.2d 1150, 1157 (Utah 1991). Thus, contrary to the government's assertion, Florida has defined the crime of attempt in a manner consistent and similar to the laws in Washington, Utah, Oklahoma, and Texas.

Finally, in an attempt to convince this Court that Mr. James' attempted burglary conviction should qualify under the ACCA (even though the Florida law would not otherwise qualify), the government provides specific "facts" regarding Mr. James' attempted burglary conviction. *See* Government Brief in Opposition at 11 (citing the Government's Brief in the Eleventh Circuit). Quite cleverly, the government chose to cite its earlier brief for specific "facts" regarding Mr. James' prior conviction, rather than informing this Court that the "facts" came from the Presentence Investigation Report (PSR). Clearly, this Court has rejected the use of information from the PSR as a source for determining whether the prior conviction qualifies under the ACCA. *See Shepard v. United States,* 544 U.S. 13 (2005). In *Shepard*, this Court rejected the government's contention that police reports could be used to determine whether a conviction qualified under the ACCA; rather, this Court held that the inquiry permitted under *Taylor* "is limited to the terms of the charging document, the terms of the plea agreement or transcript of the factual colloquy between the judge and the defendant in which the factual basis for the plea was confirmed by the defendant, or some comparable judicial record of this information." *Shepard*, 544 U.S. at 26.

The government's attempt to ignore *Shepard* should be rejected. As clearly demonstrated above, a conflict clearly exists among the circuits, despite the

government's unsupported assertions to the contrary. As such, this Court should grant this petition to resolve this circuit conflict.

CONCLUSION

Based on the reasoning and citations of authority set forth above and in Mr. James' petition for writ of certiorari, Mr. James requests that this Court grant his petition for a writ of certiorari.

Respectfully submitted this 18th day of May 2006.

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No. 05-9264

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2005

ALPHONSO JAMES, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

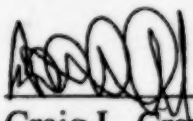
CERTIFICATE OF SERVICE

I HEREBY CERTIFY, pursuant to Supreme Court Rule 29.5(b), that on this 18th day of May 2006, true copies of the *Reply to Brief in Opposition* were sent by Federal Express Standard Overnight to Sangita K. Rao, Office of the Solicitor General of the United States, Room 5712, Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001 (Respondent); Karin B. Hoppmann, Assistant U.S. Attorney, U.S. Attorney's Office, 400 N. Tampa Street, Ste. 3200, Tampa, Florida 33602; and Alphonso James, Jr., Register No. 33689-018, FCI Coleman Low, PO Box 1031, Coleman, FL 33521. All parties required to be served

have been served.

EXECUTED this 18th day of May 2006.

R. Fletcher Peacock
Federal Public Defender



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May 18, 2006

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Re: Alphonso James, Jr. v. United States of America
Case No. 05-9264

Dear Mr. Suter:

Enclosed please find an original and ten copies of the *Reply to Brief in Opposition* and an original *Certificate of Service* for filing on behalf of the petitioner.

Sincerely,

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Enclosures

cc: *Sangita K. Rao, Office of the Solicitor General*
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No. 05-9264

IN THE

Supreme Court of the United States

ALPHONSO JAMES, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

JOINT APPENDIX

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August 17, 2006

PETITION FOR CERTIORARI FILED FEBRUARY 14, 2006
CERTIORARI GRANTED JUNE 12, 2006

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U.S. DISTRICT COURT
Middle District of Florida (Ft. Myers)

[Date Filed 06/25/2003]

CRIMINAL DOCKET FOR CASE #: 2:03-cr-00072-JES-ALL

UNITED STATES OF AMERICA,
Plaintiff,

v.

ALPHONSO JAMES JR.,
Defendant.

DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
		* * * *
06/25/2003	1	INDICTMENT as to Alphonso James (1) count(s) 1 (lap) (Entered: 06/26/2003)
		* * * *
06/27/2003	3	INITIAL APPEARANCE held on 06/27/03 before Magistrate Judge Sheri P. Chappell as to Alphonso James Jr. Tape: 03-3SPC Defendant(s) informed of rights. (lap) (Entered: 06/27/2003)
		* * * *
07/01/2003	8	DETENTION HEARING held on 07/01/03 before Magistrate Judge Douglas N. Frazier as to Alphonso James Jr. Court Reporter: Brenda Alexander (lap) (Entered: 07/02/2003)

DATE	NO.	PROCEEDINGS
07/01/2003	8	ARRAIGNMENT held on 07/01/03 as to Alphonso James Jr.. Defendant(s) pled not guilty before Magistrate Judge Douglas N. Frazier Court Reporter: Brenda Alexander (lap) (Entered: 07/02/2003)
		* * * *
07/23/2003	14	STATUS CONFERENCE held on 07/21/03 before Judge John E. Steele as to Alphonso James Jr. Court Reporter: Brenda Alexander (lap) (Entered: 07/23/2003)
		* * * *
08/15/2003	17	MOTION with memorandum in support by Alphonso James Jr. to suppress evidence Referred to Magistrate Judge Sheri P. Chappell (sll) (Entered: 08/18/2003)
		* * * *
08/25/2003	21	RESPONSE by USA as to Alphonso James Jr. in opposition to [17-1] motion to suppress evidence (sll) (Entered: 08/25/2003)
		* * * *
10/06/2003	28	STATUS CONFERENCE held on 10/6/03 before Magistrate Judge Sheri P. Chappell as to Alphonso James Jr., setting status conference for 10/28/03 @ 9:00 scheduled for Magistrate Judge Sheri P. Chappell Court Reporter: NMRS-Patsy Coleman (sll) (Entered: 10/06/2003)
		* * * *

DATE	NO.	PROCEEDINGS
10/21/2003	31	STATUS CONFERENCE held on 10/20/03 before Judge John E. Steele as to Alphonso James Jr. Court Reporter: Brenda Alexander (sll) (Entered: 10/21/2003)
		* * * *
10/28/2003	33	STATUS CONFERENCE held on 10/28/03 before Magistrate Judge Sheri P. Chappell as to Alphonso James Jr. Court Reporter: NMRS-Patsy Coleman (sll) (Entered: 10/28/2003)
		* * * *
11/25/2003	36	STATUS CONFERENCE held on 11/25/03 before Magistrate Judge Sheri P. Chappell as to Alphonso James Jr. Court Reporter: NMRS-Patsy Coleman (sll) (Entered: 11/25/2003)
		* * * *
12/11/2003	43	EVIDENTIARY HEARING held on 12/11/03 before Magistrate Judge Sheri P. Chappell as to Alphonso James Jr. Court Reporter: NMRS-Liz Barnes (sll) (Entered: 12/11/2003)
12/11/2003	44	EXHIBIT LIST by Alphonso James Jr. as to Alphonso James Jr. (sll) (Entered: 12/11/2003)
12/11/2003	45	EXHIBIT LIST by USA as to Alphonso James Jr. (sll) (Entered: 12/11/2003)
		* * * *

DATE	NO.	PROCEEDINGS
12/12/2003	47	TRANSCRIPT as to Alphonso James Jr. of evidentiary hearing held on 12/11/03 before Judge Sheri Polster Chappell. Transcript filed separately. (sll) (Entered: 12/12/2003)
12/18/2003	48	REPORT AND RECOMMENDATIONS of Magistrate Judge Sheri P. Chappell recommending denial as to Alphonso James Jr. Re: [17-1] motion to suppress evidence; Motion no longer referred ctc Objections to R and R due by 1/12/04 (sll) (Entered: 12/18/2003)
		* * * *
12/23/2003	51	OBJECTION by Alphonso James Jr. to [48-1] report and recommendations Response to objections to R and R due by 1/13/04 (sll) (Entered: 12/24/2003)
		* * * *
12/30/2003	53	ORDER denying [17-1] motion to suppress evidence and adopting [48-1] report and recommendations as to Alphonso James (1) (Signed by Judge John E. Steele) ctc (kma) (Entered: 12/31/2003)
01/08/2004	56	NOTICE regarding plea of guilty furnished to Counsel as to Alphonso James Jr. (drn) (Entered: 01/14/2004)
01/08/2004	57	CONSENT to court's inspection of PSI report prior to plea of guilty or finding of guilt by Alphonso James Jr. (drn) (Entered: 01/14/2004)

DATE	NO.	PROCEEDINGS
01/08/2004	58	WAIVER of Objection to Report & Recommendation by Alphonso James Jr. (drn) (Entered: 01/14/2004)
01/09/2004	54	NOTICE of maximum penalty, elements of offense, personalization of elements and factual basis by USA as to Alphonso James Jr. (lap) (Entered: 01/09/2004)
		* * * *
01/13/2004	59	CHANGE OF PLEA HEARING held before Magistrate Judge Douglas N. Frazier, guilty plea proffered as to Alphonso James (1) count(s) 1 Court Reporter: NMRS-Patsy Coleman. (drn) (Entered: 01/14/2004)
01/13/2004	60	REPORT AND RECOMMENDATION concerning plea of guilty as to Alphonso James Jr. (Signed by Magistrate Judge Douglas N. Frazier) ctc (drn) (Entered: 01/14/2004)
01/15/2004	61	ACCEPTANCE OF PLEA of guilty and adjudication of guilt as to Alphonso James Jr. (1) count(s) 1 Sentencing set for 10:30 4/19/04 for Alphonso James Jr. Scheduled for Judge John Steele (Signed by Judge John E. Steele) ctc (drn) (Entered: 01/15/2004)
		* * * *
04/19/2004	63	MINUTE ENTRY Sentencing continued to 05/10/04 as to Alphonso James Jr. held on 04/19/04 before Judge John E. Steele Court Reporter: Brenda Alexander (lap) (Entered: 04/20/2004)

DATE	NO.	PROCEEDINGS
05/10/2004	64	SENTENCING held on 05/10/04 before Judge John E. Steele, as to Alphonso James (1) count(s) 1. Imprisonment: 71 months; Supervised Release: 36 months; Special Assessment: $100.00 (JES-05/10/04) Court Reporter: NMRS-Patsy Coleman (lap) (Entered: 05/11/2004)
05/11/2004	65	JUDGMENT as to Alphonso James Jr. (Signed by Judge John E. Steele) ctc (lap) (Entered: 05/11/2004)
05/18/2004	66	AMENDED JUDGMENT: as to Alphonso James Jr. (1) count(s) 1. Imprisonment: 71 months; Supervised Release: 36 months; Special Assessment: $100.00 (JES-05/10/04) AMENDED: 500 Hour Drug Treatment Program (JES-5/18/04) (Signed by Judge John E. Steele) ctc (sll) (Entered: 05/19/2004)
05/28/2004	67	TRANSCRIPT as to Alphonso James Jr. of sentencing held on 4/19/04 before Judge John E. Steele. Transcript filed separately. (sll) (Entered: 06/03/2004)
06/07/2004	68	TRANSCRIPT as to Alphonso James Jr. of Sentencing held on 05/10/4 before Judge John E. Steele. Transcript filed separately. (kma) (Entered: 06/08/2004)
06/07/2004	69	NOTICE OF APPEAL by USA re: [65-1] judgment order and [66-1] judgment order as to Alphonso James (1) count(s) 1 Transcript information form due on 6/21/04 for Alphonso James Jr. ctc (kma) (Entered: 06/08/2004)

* * * *

06/10/2004 70 NOTICE OF APPEAL re: [65-1] judgment order by, [66-1] judgment order by Alphonso James (1) count(s) 1 Filing fee $ Federal Public Defender Appointed Transcript information form due on 6/24/04 for Alphonso James Jr. ctc (sll) (Entered: 06/10/2004)

* * * *

06/17/2004 NOTICE assigning 11th Circuit case number re: [69-1] appeal USCA #: 04-12915C (kma) (Entered: 06/29/2004)

06/18/2004 71 RETURN of judgment executed as to Alphonso James Jr. on 6/4/04 at FCC Coleman-Low (sll) (Entered: 06/18/2004)

06/18/2004 72 RETURN of judgment executed as to Alphonso James Jr. on 6/4/04 at FCC Coleman-Low (sll) (Entered: 06/18/2004)

* * * *

08/23/2004 80 TRANSCRIPT filed Initial Appearance for dates of 06/27/03 before Judge Sheri Polster Chappell, re 70 Notice of appeal and 69 Notice of appeal Court Reporter: NMRS-Patsy Coleman as to Alphonso James Jr. (kma) (Entered: 08/25/2004)

08/23/2004 81 TRANSCRIPT filed Status Conference for dates of 10/06/03 before Judge Sheri Polster Chappell re 70 Notice of appeal and 69 Notice of appeal. Court Reporter: NMRS-Patsy Coleman as to Alphonso James Jr. (kma) (Entered: 08/25/2004)

DATE	NO.	PROCEEDINGS
08/23/2004	82	TRANSCRIPT filed status conference for dates of 10/28/2003 before Judge Sheri Polster Chappell re 70 Notice of appeal and 69 Notice of appeal Court Reporter: NMRS-Patsy Coleman as to Alphonso James Jr. (kma) (Entered: 08/26/2004)
08/23/2004	83	TRANSCRIPT filed status conference regarding motion to suppress for date of 11/25/2003 before Judge Sheri Polster Chappell re 70 Notice of appeal and 69 Notice of appeal Court Reporter: NMRS-Patsy Coleman as to Alphonso James Jr. (kma) (Entered: 08/26/2004)
08/23/2004	84	TRANSCRIPT filed change of plea for dates of 01/13/2004 before Judge Douglas N. Frazier, re 70 Notice of appeal and 69 Notice of appeal Court Reporter: NMRS-Patsy Coleman as to Alphonso James Jr. (kma) (Entered: 08/26/2004)
10/04/2004	85	TRANSCRIPT filed arraignment and detention hearing for dates of 07/01/03 before Judge Douglas N. Frazier, re 70 Notice of appeal Court Reporter: Brenda Alexander. as to Alphonso James Jr. (kma) (Entered: 10/14/2004)
10/04/2004	86	TRANSCRIPT filed status conference for dates of 07/21/03 before Judge John E. Steele, re 70 Notice of appeal Court Reporter: Brenda Alexander, as to Alphonso James Jr. (kma) (Entered: 10/14/2004)

DATE	NO.	PROCEEDINGS
10/04/2004	87	TRANSCRIPT filed status conference for dates of 10/20/03 before Judge John E. Steele, re 70 Notice of appeal Court Reporter: Brenda Alexander, as to Alphonso James Jr. (kma) (Entered: 10/14/2004)
		* * * *
12/06/2004		PSI received from U.S. Probation for the purpose of appeal as to defendant Alphonso James Jr. (slp) (Entered: 12/09/2004)
		* * * *
12/20/2005	90	JUDGMENT of USCA (certified copy) vacating and remanding the decision of the District Court as to Alphonso James, Jr re 69 Notice of appeal and 70 Notice of appeal. EOD: 11/17/05. USCA number: 04-12915. Issued as mandate: 12/16/05. (kma) (Entered: 12/22/2005)
		* * * *
03/24/2006	92	MOTION to continue *RE-SENTENCING* by Alphonso James, Jr. (Der Ovanesian, Martin) (Entered: 03/24/2006)
03/24/2006	93	RESPONSE in opposition by United States of America as to Alphonso James, Jr re 92 Motion to continue *Resentencing* (Michelland, Jeffrey) (Entered: 03/24/2006)
03/24/2006	94	ORDER denying 92 Motion to continue as to Alphonso James Jr. (1). Signed by Judge John E. Steele on 3/24/2006. (RKM) (Entered: 03/24/2006)

DATE	NO.	PROCEEDINGS
03/27/2006	95	Minute Entry for proceedings held before Judge John E. Steele :SENTENCING UPON REMAND held on 3/27/2006 for Alphonso James, Jr. (1), Count 1, Imprisonment: 180 months; Supervised Release: 5 years; Special Assessment: $100.00 (previously paid); 500 Hour Drug Treatment Program. Court Reporter: Jeffrey G. Thomas. (BMA) (Entered: 03/27/2006)
03/28/2006	96	JUDGMENT UPON REMAND as to Alphonso James, Jr. (1), Count 1, Imprisonment: 180 months; Supervised Release: 5 years; Special Assessment: $100.00 (if not previously paid); 500 Hour Drug Treatment Program. Signed by Judge John E. Steele on 3/28/2006. (BMA) (Entered: 03/28/2006)
03/30/2006	97	NOTICE OF APPEAL by Alphonso James, Jr re 96 Judgment, Filing fee not paid. (DerOvanesian, Martin) (Entered: 03/03/2006)
		* * * *
04/27/2006	102	TRANSCRIPT of Sentencing on Remand for the date of 03/27/2006 held before Judge John E. Steele, re: 97 Notice of appeal as to Alphonso James, Jr. Court Reporter: Jeffrey G. Thomas (slp) (Entered: 04/27/2006)

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
56 Forsyth Street, N.W.
Atlanta, GA 30303-2289
(404) 335-6100

04-12915-CC

UNITED STATES OF AMERICA,
Plaintiff-Appellant-Cross-Appellee,

versus

ALPHONSO JAMES, JR.,
Defendant-Appellee-Cross-Appellant.

DOCKET ENTRIES

DATE	PROCEEDINGS
	* * * *
06/15/2004	Probable Jurisdiction Noted: Party: United States of America. Pending: No
	* * * *
08/23/2004	Transcript Filed in D.C. (10/6/03, 10/28/03, 11/25/03, 1/13/04, 6/27/03 – 5 volumes). Pending: No
08/24/2004	E-Brief Tendered: Appellant by Karin B. Hoppmann for United States of America. Party: United States of America. Pending: No

DATE	PROCEEDINGS
08/25/2004	Appellant Brief Filed: (Atty: Karin B. Hoppmann) Party: United States of America. Pending: No
08/25/2004	Record Excerpts: (Atty: Karin B. Hoppmann) Party: United States of America. Pending: No
	* * * *
10/27/2004	E-Brief Tendered: Appellee by Craig L. Crawford for Alphonso Jr. James (33689-018). Party: Alphonso Jr. James. Pending: No
10/29/2004	Appellee/Cross Appellant Brief Filed: (Atty: Craig L. Crawford) Party: Alphonso Jr. James. Pending: No
10/29/2004	Record Excerpts: (Atty: Craig L. Crawford) Party: Alphonso Jr. James. Pending: No
	* * * *
01/13/2005	E-Brief Tendered: Appellant by Karin B. Hoppmann for United States of America. Party: United States of America. Pending: No
01/14/2005	Cross-Appellee Brief Filed: M1/18 PT'D (COC incorrect) (Atty: Karin B. Hoppmann) Party: United States of America. Pending: No
	* * * *
01/18/2005	Supplemental Authority for Appellant: (Atty: Karin B. Hoppmann) Party: United States of America. Pending: No
	* * * *
09/15/2005	Oral Argument Scheduled: 09/15/05. Pending: No

DATE	PROCEEDINGS
09/15/2005	Supplemental Authority for Appellant: (Atty: Karin B. Hoppmann) Party: United States of America. Pending: No
09/19/2005	Karin B. Hoppmann argued for Appellant; Craig L. Crawford argued for Appellee. Pending: No
11/17/2005	Judgment Entered. Pending: No
11/17/2005	OPIN1 (Notice of issuance of opinion) issued. c:Crawford, Craig L.; c:Derovanesian, Martin; c:Hoppmann, Karin B.; c:Michelland, Jeffrey F.; c:Peacock, R. Fletcher, c:Steele, John E. Pending: No
11/17/2005	Opinion Issued-04-12990X-VACATED AND REMANDED. Pending: No
	* * * *
12/16/2005	CASE CLOSED-Mandate Issued. Pending: No
12/16/2005	Mandate Issued. Pending: No
	* * * *
02/24/2006	Notice of Filing Certiorari: SC# 05-9264. Party: Alphonso Jr. James. Pending: Yes
06/20/2006	Certiorari Granted S Ct # 05-9264: (Granted as to Question 2 and ifp) (Atty: Craig L. Crawford). Party: Alphonso Jr. James. Pending: No

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

[Filed JUN 25, 2003]

CASE NO. 2:03-cr-72-FtM-29SPC

UNITED STATES OF AMERICA,

v.

ALPHONSO JAMES, JR.,

INDICTMENT

The Grand Jury charges that:

COUNT ONE

On or about January 31, 2003, at Fort Myers, in Lee County, in the Middle District of Florida,

ALPHONSO JAMES, JR.,

defendant herein, then being a person convicted of a crime punishable by imprisonment for a term exceeding one year, namely:

(a) *Attempted Burglary of a Dwelling*, in violation of Florida Statutes, Sections 810.02 and 777.04, a crime punishable by imprisonment for a term exceeding one year, in the Circuit Court, Twentieth Judicial Circuit, in and for Lee County, Florida, in *State of Florida vs. Alphonso James*, Case No. 94-2197CF, on June 3, 1997;

(b) *Possession of a Cocaine*, in violation of Florida Statutes, Section 893.13, and *Trafficking in Illegal Drugs*, in violation of Florida Statutes, Section 893.135, crimes punishable by imprisonment for a term exceeding one year, in the Circuit Court, Twentieth Judicial Circuit, in

and for Lee County, Florida, in *State of Florida vs. Alphonso James, Jr.*, Case No. 96-3132CF, on January 28, 1998: and

(c) *Trafficking in Cocaine*, in violation of Florida Statutes, Section 893.135, a crime punishable by imprisonment for a term exceeding one year, in the Circuit Court of the 17th Judicial Circuit in and for Broward County, Florida, in *State of Florida vs. Alphonso James*, Case No. 97-11458CF, on June 29, 1998,

did knowingly possess in and affecting commerce a firearm, namely, an F.E.G., Model Mark II APK, .380 caliber semi-automatic pistol, serial number AK01866, and Remington .380 caliber ammunition.

In violation of Title 18, United States Code, Section 922(g)(1) and Section 924(e).

FORFEITURE

The allegations contained in Count One of this Indictment are hereby realleged and incorporated by reference for the purpose of alleging forfeiture pursuant to the provisions of Title 18, United States Code, Section 924(d)(1) and Title 28, United States Code, Section 2461.

From his engagement in any or all of the violations alleged in Count One of this Indictment, defendant ALPHONSO JAMES, JR. shalt forfeit to the United States, pursuant to Title 18, United States Code, Section 924(d)(1) and Title 28, United States Code, Section 2461, all of his right, title and interest in:

Any firearm or ammunition involved in or used in any knowing violation of Title 18, United States Code, Sections 922(g)(1) and 924(a)(2), to include an F.E.G., Model Mark II APK, .380 caliber semi-automatic pistol, serial number AK01866, and Remington .380 caliber ammunition.

A TRUE BILL.

/s/ [Illegible]
FOREPERSON

Date 6/25/03

PAUL I. PEREZ
United States Attorney

BY: /s/ Jeffrey F. Michelland
JEFFREY F. MICHELLAND
Assistant States Attorney
Trial Counsel

BY: /s/ Douglas Molloy
DOUGLAS MOLLOY
Assistant United States Attorney
Chief, Fort Myers Division

UNITED STATES DISTRICT COURT
Middle District of Florida
Fort Myers Division

THE UNITED STATES OF AMERICA

vs.

ALPHONSO JAMES, JR.

INDICTMENT

Violations:

Title 18, United States Code, Sections 922(g)(1) and 924(e).

A true bill,

/s/ [Illegible]
Foreperson

Filed in open court this 25th day of June, A.D. 2003.

Clerk

Bail $____

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

[Filed MAY 28, 2004]

CASE NO. 2:03-CR-72-FTM-29DNF

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

ALPHONSO JAMES, JR.
Defendant.

Fort Myers, Florida
April 19, 2004
10:35 a.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JOHN E. STEELE,
UNITED STATES DISTRICT JUDGE

* * * *

[3] THE COURT: I'll give you the continuance, but I want to talk about some of these issues and kind of flesh them out. The issue, as I see it, that will impact the defendant's guideline range involves the applicability of the armed career offender provision or the inapplicability, as it may be, which relates to the analysis of his prior record. The information for trafficking in cocaine, I think, is one of the convictions where there is a question as to whether it's a qualifying conviction under the armed career criminal statute.

My initial take on it, for what it's worth, is that the information properly charges trafficking in cocaine under state law because it alleges possession of, in this case, 200 grams or more, but less than 400 grams of cocaine, [sic] So, I think it does

charge trafficking. The issue is whether this charge of trafficking qualifies under the armed career criminal offender provision.

My initial reading of it would be that it does not qualify. That it's one of those trafficking alternatives that is not a controlled substance offense within the meaning of the federal statute.

The possession of cocaine charged in the indictment, I think is clear doesn't qualify. The attempted [4] burglary of a dwelling is problematic, but I think in the final analysis does qualify. There's a recent Eleventh Circuit case had that says attempted arson under the same statutory provision counted. If attempted arson counts, I see no reason why attempt to burglary doesn't.

MR. DEROVANESIAN: I had a Fifth Circuit case on point on that issue. I don't know if you wanted me to provide it.

THE COURT: Sure.

And then the last trafficking conviction, my understanding is that the information alleges trafficking by unlawfully and knowingly selling, manufacturing and delivering cocaine which clearly, to me, comes within the controlled substance offense. So when I go through the four alleged convictions, I have two of them counting and two of them not counting. And arguments, perhaps, on two of those as to whether, in your case, whether the attempted burglary counts in the government's case, whether the one trafficking counts. Those are the issues as I see them shaking loose in this particular sentencing.

* * * *

[10] THE COURT: To me, that distinguishes *Madera Madera. Madera*, of course, was Georgia statute and a different sentencing guideline but similar. So I will be looking forward to the argument as to the discussion on the Florida statute. Particularly, if you have case law saying that under the definition of a serious drug offense and it only counts—well, it doesn't necessarily have to have an element

of the intent to distribute, just that factually it has a fact pattern that involves that.

You may be right. I'm not initially convinced because my memory is that the Eleventh Circuit requires a categorical approach. When you look at the statute and look at the information and you don't look at the underlying facts, but we can get into that next time as well.

Mr. DerOvanesian, let me give you the cite to that [11] case I was talking about with the attempted arson.

MR. DEROVANESIAN: Your Honor, I'm aware of that.

THE COURT: You have that? All right.

MR. DEROVANESIAN: Yes, sir.

THE COURT: Anything else anyone wants to discuss or any other cases or cites you want to give me to take a look at?

MR. MICHELLAND: Yes, your Honor. *United States v. Demint*, an Eighth Circuit case, 74 F.3d, 876. That case specifically dealt with whether or not Florida conviction for attempted burglary falls within the definition of violent felony under the Armed Career Criminal Act. It says it did under the catchall provision. That case was decided in 1996. I have a copy for the Court.

THE COURT: Great.

* * * *

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

[Filed JUN 7, 2004]

CASE NO. 2:03-CR-72-FTM-29SPC

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

ALPHONSO JAMES, JR.
Defendant.

Fort Myers, Florida
May 10, 2004
2:00 p.m.

TRANSCRIPT OF PROCEEDINGS SENTENCING
BEFORE THE HONORABLE JOHN E. STEELE
UNITED STATES DISTRICT JUDGE

* * * *

[4] [MR. DEROVANESIAN:] Regarding the application of the guidelines, we are of the opinion that two of his prior convictions, that being the attempted burglary and one of his drug cases—we're of the opinion that neither one should be scored for purposes of making a determination of whether he's an armed career offender.

THE COURT: And which of the drug convictions?

MR. DEROVANESIAN: His 1997 case from Broward County. Looks like the state court case number is 97-11458-CF-B.

THE COURT: What paragraph is that in?

MR. DEROVANESIAN: If I may have a moment.

THE COURT: I think it looks like that's Paragraph 41. That's how I had them tracked here.

MR. DEROVANESIAN: Yes, sir. Paragraph 41.

THE COURT: And with regard to the convictions in Paragraph 39, are you counting that as one or two convictions?

MR. DEROVANESIAN: Your Honor, as far as I know, that's one.

THE COURT: All right. Well, he's got—he pled to possession of cocaine and trafficking in illegal drugs, presumably separate counts.

Let me ask Mr. Michelland.

As I counted, there's four convictions, Paragraph [5] 29 being an attempted burglary of a dwelling; Paragraph 39, one being for possession of cocaine and the second for trafficking illegal drugs; and then, finally, Paragraph 41, trafficking in cocaine.

Which of those four do you suggest are countable for the enhancement for the armed career criminal?

MR. MICHELLAND: Are you addressing me, Your Honor?

THE COURT: Yes, sir.

MR. MICHELLAND: Your Honor, I believe that the attempted burglary is countable, Paragraph 29. I believe that the trafficking in illegal drugs in Paragraph 39 is countable, which would be Count Number 2; and I believe that the trafficking cocaine, 200 to 400 grams, is countable in Paragraph 41.

THE COURT: All right. So you would concede then that the possession of cocaine in Paragraph 39 is not countable?

MR. MICHELLAND: I would concede that. I believe that's simple possession and would not qualify under the statute.

THE COURT: All right. I would agree with that.

All right. Mr. DerOvanesian, let me hear your arguments then with regard to the two that you challenge, that is, Paragraph 29 and Paragraph 41.

[6] Mr. James, if you wish, you may have a seat.

MR. DEROVANESIAN: Your Honor, regarding Paragraph 29, the attempted burglary, our position falls in line with United States versus Martinez, a Fifth Circuit case out of 1992. And we would argue to the Court that under Florida law an attempted burglary just does not present the same danger or degree of danger as presented by a burglary and it's not specifically listed as an offense with any definitions under 924(e), and we would ask the Court to so find.

In U.S. versus Martinez, the analysis was for an offense under Texas law; but in analyzing Florida law, which is under 810.02 and the sections regarding attempt, our position is that it's essentially the same as the result under Texas law.

They noted that under Texas law attempted burglary did not require entering or remaining in a dwelling to violate the statute. Our position is that the Florida law is the same.

In Florida the courts have defined attempted burglary as essentially a defendant doing some act towards the commission of a crime of burglary. It goes beyond some—it goes beyond just thinking or talking about it. And, two, a requirement that the defendant would have committed the crime except for someone preventing him from [7] doing it or the act failed.

Those definitions are found in Jones versus State, and it's at 608 So.2d 797, showing it's a Florida Supreme court case from 1992.

And our position is that attempted burglary of a dwelling—or, excuse he, attempted burglary is not a qualifying offense under 924(e) based upon those authorities.

THE COURT: Well, what do you do with the Eighth Circuit case that last time we were here Mr. Michelland cited that—DeMint, which was 74 F.3d 876, that held that the Florida attempted burglary conviction in that case did qualify as a violent offense under 924(e)?

MR. DEROVANESIAN: Your Honor, regarding DeMint, I would argue that—well, there's obviously a conflict. Our circuit is more closely in line with the Fifth and would argue that the Fifth is the correct analysis and that you should rule under the ruling or the analysis maintained by the Fifth.

The other thing that's interesting about DeMint is that, if I'm looking at it correctly, it looks like under DeMint they are finding that attempted burglary is not burglary under the definitions of 924(e), but that they find that it somehow fits into the catchall provision, which is also an interesting twist on it. Martinez, the Fifth [8] Circuit, believed that it didn't fit under either.

Looking at the way the attempted burglary is charged and going to the charging document, I would argue that the Court in Martinez took the correct approach. I don't believe that either looking at the Florida statute or the charging document is sufficient in this case to either bring it under burglary or bring it under the catchall provision, and I would argue that the Fifth Circuit's analysis and ruling is the correct one.

THE COURT: It also appears to be the minority one.

In 1998 there's a case called U.S. versus Collins, which is 150 F.3d 668, a Seventh Circuit case that collected the

decisions at that point in time; and the Seventh Circuit joined what it said was six other circuits in holding that attempted burglary was a violent crime, but it noted that three circuits held to the contrary. So at least in 1998, the split was seven-three. None of the others other than DeMint dealt with Florida, but that seemed to the split back then.

Mr. Michelland, how do you get attempted burglary to count as a violent felony?

MR. MICHELLAND: Your Honor, there are actually two issues here. I guess we don't need to get to the one if—if under 924(e) these convictions qualify, then we [9] don't need to get to the guideline itself under 4B1.—2K2.1 and 4B1.2 and 1, because then the question would be do they still count under 2B2.1. But under the armed career criminal act, the guideline application actually says that the term violent felony and serious drug offense in 924(e)(2) are not identical to the definitions of crimes of violence and controlled substance offense in 4B1.1.

But the term violent felony means any crime punishable by imprisonment for a term exceeding one year; that as an element, the use, attempted use or threatened use of physical force against the person of another is burglary or some of the other enumerated offenses, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

In United States versus Rainey, the Eleventh Circuit said and held as a matter of first impression that attempted arson should be considered a violent felony under 18 U.S.C. 924(e). That decision supports my analogy, a finding that attempted burglary would fall under the enumerated offenses or at least be—qualify as conduct that presents a serious potential risk of physical injury to another.

You go into a house and commit a burglary, obviously, there is a serious risk that someone's going to be there. If you attempt to do so, that risk doesn't [10] go away. The risk is

still there if you attempt to go in and commit the burglary but for some reason aren't successful. You don't know how someone's going to respond. They may even see you outside trying get in and they may respond and use physical force either against the perpetrator which would cause the perpetrator to use physical force against the person responding.

So I think the DeMint case is really on point here. It addresses the attempted burglary statute, and if you couple that with Rainey—and I'm not going to go through the analysis under DeMint because the Court's read it, but I'm just basically arguing that under attempt in the Florida statute it says, "A person who attempts to commit an offense prohibited by law and in such attempt does any act towards the commission of such offense but fails in the perpetration or is intercepted or prevented in the execution thereof commits the offense of criminal attempt."

So obviously if the defendant here had been convicted of attempt to commit burglary, he committed some act towards the commission of such offense and in committing such an act he presented a serious potential risk of physical injury to another. And that's essentially I think what DeMint is saying.

THE COURT: I think you're right that that's what [11] DeMint is saying. I'm not sure they got it right.

DeMint says, as I read it, that under Florida law the attempt statute punishes only conduct with severe potential risk of physical injury to another. I'm not sure that's correct. I'm not sure if Florida law is so limited.

You just read the attempt statute in Florida law and it talks about any act. It doesn't say any act that has a severe potential for physical risk of injury to another. But that's the gloss that DeMint seemed to put on the Florida statute.

MR. MICHELLAND: Well, it says, "Who attempts to commit an offense and in attempting to do so commits an act

towards the commission of the offense." So not only do you commit an act towards the commission of the offense, you have to actually attempt to commit the offense. You have to do—I don't know what the facts would be, if there's a lot of fact scenarios where you would attempt.

If you simply buy burglary tools, I don't think that's going to be enough. You have to look at the elements of the offense and then determine whether someone factually has done something in furtherance of those elements.

So it's entering or attempting to enter into a structure with the intent to commit a felony therein. You've got to attempt to go into the structure. I can't imagine that you would be charged with attempting to commit [12] a burglary if you're sitting in your car and you have burglary tools. I just—I don't know. It seems that it's not—there's not a sufficient nexus for an attempt.

But even if you disregard DeMint and you look at the Rainey case, it basically says if you attempt to commit an arson. And what's the difference between attempting to commit an arson and attempting to commit any other crime? I think the argument there is you attempt to commit any of the enumerated crimes, and in this case burglary is an enumerated crime—I think you can look at it in two different ways. You can look at it from the DeMint viewpoint or you can look at it from the Rainey viewpoint; and they're looking at it from two different ways.

And I think attempted burglary would fall within either of those analyses because clearly burglary is—there's been no argument that burglary—Florida burglary statute does not fall within 924(e). And if that is the argument, I mean the Taylor case pretty much addresses that and there's other cases that address that.

So it doesn't say it has to be burglary of a dwelling or a structure. It simply says burglary. And so clearly the crime of

burglary falls within 924(e), and Rainey says an attempt to commit such a crime satisfies 924(e) because it's one of the enumerated felonies. And it says, "Attempt like conspiracy presents a potential risk [13] of physical injury to another because attempted arson presents a serious potential risk of injury to another person. we hold that 924(e)"—and I don't think they're looking at—and the Rainey case actually deals with Florida—the Florida arson statute, and I'm assuming that they're looking at the same attempt statute that we are here, 777.04, which is the same—they're looking at the same attempt statute. And if they're reviewing the same attempt statute, they're looking at the same language. And if the Court is concerned about that language where an attempt could be something other than what the DeMint serious risk of potential risk of physical injury to another, well, Rainey pretty much covers that by saying the Florida arson—the Florida attempt statute does present—even though it involves arson, it still presents a serious physical risk of injury to another.

THE COURT: All right. Mr. DerOvanesian, why doesn't Rainey control or at least be strongly persuasive?

MR. DEROVANESIAN: Your Honor, in response to Mr. Michelland's argument and the Court's question, Mr. Michelland seems to go to this attempt language and try and weave it in and define to the Court what attempted burglary is all about.

You don't need to do that. The Florida Supreme Court has defined attempted burglary in the Jones case, as [14] I've argued previously. And what's interesting is the definition that the Supreme Court gives to attempted burglary is consistent with what you confronted Mr. Michelland with when you asked him questions regarding it.

The Florida Supreme Court says attempted burglary is nothing more than just the bare intent to commit a burglary and some overt act directed towards its commission.

Quite frankly when I stood up here, I was going to argue that if Mr. James intended to commit a burglary and bought a flashlight to help him in the commission of the crime, then technically he'd be in violation of the law. Mr. Michelland seems to impute more to it. Mr. Michelland seems to be arguing to the Court that you would need some type of attempted entry or more in order to commit the crime of attempted burglary. That is not what the law says.

And, again, we would argue that Jones versus State at 608 So.2d 797 defines it. You don't need to take the burglary statute and the attempt statute and try and combine them, the Supreme Court's done that. And their analysis is consistent with the Court's analysis and contrary to Mr. Michelland's.

Mr. Michelland told the Court that buying burglary tools in his opinion would not qualify under his analysis of attempted burglary in Florida. I submit that it would. And if you look at the definition, I would argue to the [15] Court that Mr. Michelland's wrong about that.

In DeMint, to the extent that it implies that there is some type of violent nature to all attempted burglaries, I would submit it is way off base as well.

Going directly to the Court's question regarding Rainey, the difficulty I have with Rainey is that it looks like the Court relied very heavily on their prior decisions, those being in the Wilkerson case and Mendoza-Cecelia. It looked like what they did was the Eleventh Circuit has already very carefully considered the issues of robbery and attempted robbery and they sorted all the issues out regarding that in the Wilkerson case; and Mendoza-Cecelia, they have done that as far as arson.

The difficulty I have is that attempted burglary is something altogether different. You don't have a situation such as these where you're dealing with robbery and arson, which I would submit to the Court by their very nature are far more serious inherently and generally tend to involve a victim more directly, and it's inherent in the nature of those offenses. Burglary does not. Breaking into someone's home when no one's home or attempting to do that or anything along those lines I would argue to the Court is inherently far less of a serious offense than either of these two.

I think when you look at Rainey there's very [16] little analysis by the Court and it looks like they're just really relying heavily on their analysis in these prior cases, and neither one of them involved the attempted burglary statute.

I would argue that this case is distinguished and based on the authorities that we have cited—if you look at everything that I've argued, I submit that it really does bring you back to the analysis that the Fifth Circuit did in Martinez, and I argue that based on Florida law it is the more correct approach. That's the one we would ask the Court to consider.

THE COURT: All right. Mr. Michelland, what about Jones?

MR. MICHELLAND: Your Honor, I haven't received a copy of Jones from Mr. DerOvanesian. This is the first I've heard of Jones. I don't think the Court cited Jones previously.

THE COURT: No.

MR. MICHELLAND: I was—I provided Mr. DerOvanesian with my case law. However, I have not had a copy of Martinez or Jones, so I don't know what he's talking about. I haven't been able to analyze those cases. I don't know if the Court's had an opportunity to.

THE COURT: But do you know if what he's telling me is true or does it matter?

[17] MR. MICHELLAND: I don't know, Your Honor. All I can say is it doesn't matter whether one crime, arson, is more serious than burglary. Obviously, Congress decided that burglary is serious enough to be considered a violent crime and that's all the Court needs to look at, whether it's a violent crime, not whether it's more serious in the hierarchy of things. Terroristic acts are more serious than burglary or than some of these other offenses, but they're all serious enough to qualify.

As to the other argument on Martinez, I haven't read it, I don't know whether it deals specifically with 924(e) or whether it deals with the guideline.

Mr. DerOvanesian, do you have a copy?

MR. DEROVANESIAN: Sure.

MR. MICHELLAND: Can I have a second, Your Honor?

THE COURT: Sure. I think he cited it last time because I think he gave me a copy of his case. Somebody gave me a copy of Martinez.

MR. MICHELLAND: Your Honor, all I remember is him saying it was a—I think he said a Fifth Circuit case, but he never gave—I don't remember him citing it. I didn't write it down. He may have.

THE COURT: You may be right. Somebody gave me Martinez and I have to assume it was Mr. DerOvanesian.

MR. MICHELLAND: This is Jones.

[18] Your Honor, the Jones case says, "The attempt of—the offense of attempted burglary or the intent to commit burglary and some overt act directed towards its commission." The DeMint case actually says the Florida courts have interpreted the attempt statute to require more than essentially any act. They say that it's an intent—"Intent to commit burglary and any overt act reasonably calculated to

accomplish the commission of the offense intended, going beyond mere preparation but falling short of accomplishing the crime intended."

THE COURT: The problem is they cite very old Florida District Court of Appeals cases, all of which were decided before the Jones case by the Florida Supreme Court.

MR. MICHELLAND: Well, the Jones case says, "Some overt act directed towards its commission." But, again, the Jones—the Jones case seems to say that—again, I just—I'm trying to read it so quickly.

Now, they're distinguishing between whether or not there would be double jeopardy for attempted burglary and possession of burglary tools; and the Court said that there was a distinction and they used the case of Thomas—I'm trying to find it—and I'll just read it real quick. I can't find the cite for it. It's in there somewhere, the cite is.

They say, "A distinction between the overt acts [19] necessary to commit the two crimes as illustrated by the facts in Thomas. In that case a confidential informant had advised the police that the defendant had committed a number of burglaries in a particular neighborhood. During surveillance in the area, the police arrested the defendant after seeing him jump over a fence and try to run away. At that time he was wearing a pair of socks over his hands and carrying a screwdriver.

"He admitted that he had entered the neighborhood to commit a burglary, but said he had been arrested before being able to perpetrate the crime. We concluded that there was sufficient overt activity to convict of possession of burglary tools; however, based on these facts it is obvious that Thomas could not have been convicted of attempted burglary because there had been no overt act directed towards entering or remaining in a structure or conveyance."

I think that covers the argument that I made about possession of burglary tools.

THE COURT: Mr. DerOvanesian, anything else?

MR. DEROVANESIAN: Just the purpose of the Jones case was to show what the definition of attempted burglary was. I don't know how Mr. Michelland believes he's made some point referring to some underlying case that is mentioned in reference. But the definition stands. That's what the Florida Supreme Court says attempted burglary is; [20] and I submit to the Court that based on the statute that we have before you, it just does not meet the criteria. I ask the Court to so find.

MR. MICHELLAND: Your Honor, I would proffer to the Court the Jones case.

THE COURT: Sure.

MR. MICHELLAND: It's on the last page of the opinion that I was addressing.

THE COURT: All right. The issue is whether the defendant's conviction for the attempted burglary of a dwelling constitutes a violent felony within the meaning of Section 924(e). It is clear that the Florida burglary statute does satisfy 924(e) when analyzed under the case of Taylor versus the United States, which is 495 United States 575, a 1990 case; and there's been no argument to the contrary there. The only issue is whether an attempted burglary is a qualifying felony conviction.

I do have concerns about whether the DeMint case got it right. I'm frankly not sure that the Florida attempt statute punishes only conduct with a severe potential risk of physical injury to another.

However, I don't think there's any way of distinguishing the Florida attempted burglary statute from the Rainey decision. The issue in Rainey was whether an attempt to commit an enumerated felony under 924(e) [21] constituted a

violent felony. In that case the attempt was arson and the Eleventh Circuit said it was a violent felony. It relied, as we noted, on some prior cases.

Burglary is an enumerated felony. Burglary is—seems to be no less serious than the other offenses set forth; and I presume Congress grouped those offenses because they decided that burglary was similar to arson, extortion and offenses involving the use of explosives.

It seems to me that the Eleventh Circuit has essentially spoken; that if you have an attempt to commit an enumerated felony, that is a violent felony, so the Court is going to overrule the defendant's objection and the Court does hold that the attempted burglary of the occupied dwelling set forth in Paragraph 29 is a qualifying offense under the armed reoffender statute.

* * * *

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FT. MYERS DIVISION

[Filed MAY 18, 2004]

Case Number: 2:03-CR-72-FTM-29SPC
USM Number: 33689-018

UNITED STATES OF AMERICA

-vs-

ALPHONSO JAMES, JR.

Martin DerOvanesian, FPD
2110 First Street, Suite 2-146
Fort Myers, FL 33901

AMENDED JUDGMENT IN A CRIMINAL CASE

The defendant pleaded guilty to Count One of the Indictment. Accordingly, the court has adjudicated that the defendant is guilty of the following offense(s):

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 U.S.C. § 922 (g)(1)	Felon in Possession of a Firearm	January 31, 2003	One

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

IT IS ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Date of Imposition of Sentence:
May 10, 2004
First Amended: May 18, 2004

/s/ John E. Steele
JOHN E. STEELE
UNITED STATES DISTRICT JUDGE

May 18, 2004

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 71 Months.

The Court recommends to the Bureau of Prisons:

1. Participation in 500 hour drug treatment program, if and when eligible.

2. Incarceration as close to home as possible, it not inconsistent with drug treatment.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By: _____
Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter.

The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervision that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervision in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;

2. The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4. The defendant shall support his or her dependents and meet other family responsibilities;

5. The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6. The defendant shall notify the probation officer at least ten (10) days prior to any change in residence or employment;

7. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9. The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11. The defendant shall notify the probation officer within seventy-two (72) hours of being arrested or questioned by a law enforcement officer;

12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

ADDITIONAL CONDITIONS OF SUPERVISED RELEASE

The defendant shall also comply with the following additional conditions of supervised release:

1. The defendant shall participate as directed in a program (outpatient and/or inpatient) approved by the Probation Officer for treatment of narcotic addiction or drug or alcohol dependency which may include testing for the detection of substance use or abuse. Further, the defendant shall be required to contribute to the costs of services for such treatment not to exceed an amount determined reasonable by the Probation Officer based on ability to pay or availability of third party payment and in conformance with the Probation Office's Sliding Scale for Substance Abuse Treatment Services.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth in the Schedule of Payments.

Total Assessment	Total Fine	Total Restitution
$100.00	Waived	NA

The defendant shall pay interest on any fine or restitution of more than $2,500, unless the fine or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on the Schedule of Payments may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994 but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

Special assessment of $100.00 due immediately

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court, unless otherwise directed by the court, the probation officer, or the United States attorney.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

FILE COPY

Date Printed: 05/19/2004

Notice sent to: All parties &

Jeffrey Michelland, Esq.
U.S. Attorney's Office
Middle District of Florida
U.S. Courthouse
2110 First St., Room 3-137
Ft. Myers, FL 33901

2:03-cr-00072 sll

Martin Der Ovanesian, Esq.
Federal Public Defender's Office
Federal Bldg., Suite 2-146
2110 First St.
Ft. Myers, FL 33901

2:03-cr-00072 sll

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 04-12915

UNITED STATES OF AMERICA,
Plaintiff-Appellant-Cross-Appellee,

v.

ALPHONSO JAMES, JR.,
Defendant-Appellee-Cross-Appellant.

Nov. 17, 2005

Appeals from the United States District Court
for the Middle District of Florida

Before BLACK, WILSON and COX, *Circuit Judges.*

WILSON, *Circuit Judge:*

This appeal addresses whether certain Florida state convictions qualify as predicate felony convictions under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e). Alphonso James, Jr. was indicted for possessing a firearm after having been convicted of a felony, in violation of 18 U.S.C. § 922(g)(1). At sentencing, the district court found that two of James's previous felony convictions qualified as predicate convictions under the ACCA, but rejected a third conviction, and therefore, did not enhance James's sentence under the ACCA. The United States ("the Government") appeals the district court's ruling. James cross-appeals, challenging the district court's decision to count one of his previous convictions as a qualifying felony under the ACCA. James also argues that § 922(g) is unconstitutional.

We hold that the district court erred when it held that James's Florida conviction for trafficking in cocaine by possession of between 200 and 400 grams of cocaine was not a predicate conviction under the ACCA. We therefore vacate the sentence imposed and remand, directing the district court to sentence James in accordance with the ACCA.

I. BACKGROUND

In June of 2003, the Government charged James with possession of a firearm after having been convicted of a felony, in violation of 18 U.S.C. § 922(g)(1). James pled guilty as charged.

The Government sought to have James's sentence enhanced under the ACCA, 18 U.S.C. § 924(e). The ACCA provides a mandatory minimum term of imprisonment of 15 years for any person who violates 18 U.S.C. § 922(g) after three convictions in either federal or state court for a "violent felony" or "serious drug offense." *See* § 924(e). In 1997, James was convicted in a Florida state court of attempted burglary of a dwelling, in violation of Florida Statute §§ 810.02 and 777.04. In 1998, James was convicted in Florida state court of trafficking in illegal drugs in violation of Florida Statute § 893.135. Later that year, James was again convicted in Florida state court under the same statute for trafficking in cocaine by possession of between 200 and 400 grams of cocaine. Based on James's three prior felony convictions, the probation officer recommended that James be sentenced as an armed career criminal under the ACCA.

At sentencing, James objected, arguing that neither his attempted burglary conviction, nor his trafficking by possession conviction, should count as a predicate conviction under the ACCA. The district court concluded that James's attempted burglary conviction was a "violent felony" under § 924(e)(2)(B) of the ACCA. The district court also concluded, however, that James's trafficking by possession

conviction did not qualify as a "serious drug offense" under § 924(e)(2)(A) of the ACCA, reasoning that the Florida statute under which James was convicted did not include as an element of proof that James had intended to distribute his 200 to 400 grams of cocaine. Therefore, the district court refused to enhance James's sentence under the ACCA because he did not qualify as an armed career criminal, as he had only two predicate convictions. The district court sentenced James to 71 months' imprisonment, followed by 36 months' supervised release.

The Government now appeals the district court's decision not to count James's trafficking by possession conviction as a "serious drug offense" for purposes of sentencing him under the ACCA. James cross-appeals, challenging the district court's decision to count his attempted burglary conviction as a "violent felony." James further argues that § 922(g) is unconstitutional either facially, or as applied to him, because it exceeds Congress's authority under the Commerce Clause.

II. DISCUSSION

There are two issues on appeal:[1] (1) whether the district court erred by failing to count James's conviction for trafficking in cocaine by possession of between 200 and 400 grams of cocaine as a "serious drug offense" under the ACCA; and (2) whether the district court erred by counting James's conviction for attempted burglary of a dwelling as a "violent felony" under the same statute. We review *de novo* whether a conviction is a "violent felony" or a "serious drug offense" within the meaning of § 924(e). *United States v. Wilkerson*, 286 F.3d 1324, 1325 (11th Cir.2002) (per curiam).

---

[1] James raises his argument that § 922(g) is unconstitutional for the first time on appeal. "This Court has repeatedly held that an issue not raised in the district court and raised for the first time in an appeal will not be considered by this court." *Access Now, Inc. v. Southwest Airlines Co.*, 385 F.3d 1324, 1331 (11th Cir.2004) (internal quotations omitted). Therefore, James has failed to preserve this claim, and we will not address it.

A. Whether Trafficking in Cocaine by Possession of between 200 and 400 Grams of Cocaine is a "Serious Drug Offense"

The Government argues that the district court erred by failing to count James's Florida state conviction for trafficking in cocaine by possession of between 200 and 400 grams of cocaine as a "serious drug offense" under the ACCA. The ACCA defines a "serious drug offense" as "an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance . . . , for which a maximum term of imprisonment of ten years or more is prescribed by law." § 924(e)(2)(A)(ii).

The Florida Statute under which James was convicted, section 893.135(1)(b)(1)(b), reads as follows:

> Any person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 28 grams or more of cocaine, as described in § 893.03(2)(a)4., or of any mixture containing cocaine, but less than 150 kilograms of cocaine or any such mixture, commits a felony of the first degree, which felony shall be known as "trafficking in cocaine,". . . . If the quantity involved:
>
> . . .
>
> b. Is 200 grams or more, but less than 400 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 7 years, and the defendant shall be ordered to pay a fine of $100,000.

The district court concluded that the statute did not satisfy the ACCA's requirement that the offense involve the "intent to manufacture or distribute," § 924(e)(2)(A)(ii), because the Florida statute does not have "as an element" of the offense an intent to manufacture or distribute.

On appeal, the Government argues that Congress defined a "serious drug offense" under the ACCA to include any state

offense "involving" the intent to distribute, not only those offenses having "as an element" such intent. In support, the Government cites *United States v. Madera-Madera*, 333 F.3d 1228 (11th Cir.2003), *cert. denied*, 540 U.S. 1026, 124 S.Ct. 589, 157 L.Ed.2d 447 (2003), in which we rejected the district court's reasoning in an analogous context. In *Madera-Madera*, the defendant committed a prior offense of possession of 87 grams of methamphetamine, a violation of a Georgia law prohibiting the possession of 28 grams or more of the drug. *Id.* at 1231. We had to determine whether such an offense qualified as a "drug trafficking offense" for purposes of enhancement under the Sentencing Guidelines. *Id.* Although Georgia law expressly designated the defendant's offense as drug "trafficking," the defendant argued that the offense should not be considered a trafficking offense under the Sentencing Guidelines because he merely possessed the drugs. *Id.* We rejected this argument for several reasons. *Id.*

We explained that Georgia enacted a three-tiered scheme for punishing drug crimes: (1) possession of any amount; (2) possession with the intent to distribute any amount; and (3) "trafficking" by possession of more than 28 grams. *Id.* Further, we concluded that such a scheme necessarily recognizes that someone who is convicted of drug trafficking, the offense to which the defendant pled guilty, "plans on distributing and thereby 'trafficking' those drugs. In making possession of 28 grams of methamphetamine a 'trafficking' offense, Georgia's trafficking statute necessarily infers an intent to distribute once a defendant possess a certain amount of drugs." *Id.* at 1232. The Government here argues that Florida has nearly an identical three-tiered scheme, and therefore, we should apply our reasoning in *Madera-Madera* to hold that Florida's drug trafficking statute also infers an intent to distribute.

In response, James relies on *Gibbs v. State*, 698 So.2d 1206 (Fla.1997), a case that the district court referenced when making its ruling. In *Gibbs*, the Florida Supreme Court held

that Florida convictions for both simple possession of cocaine and drug trafficking by possession of cocaine based on the same conduct violated the Double Jeopardy Clause because none of the elements of the drug trafficking statute differed from the elements of the simple possession statute. *Id.* at 1208-10. James argues that this case indicates that drug trafficking by possession in Florida does not involve the intent to manufacture or distribute.

In determining whether a particular offense is a "serious drug offense" under the ACCA, sentencing courts adopt a categorical approach, looking only to the statutory definition of the crime charged, rather than the actual facts of the individual's prior conviction. *See Taylor v. United States*, 495 U.S. 575, 600-02, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990); *see also, Shepard v. United States*, 544 U.S. 13, 125 S.Ct. 1254, 1257, 161 L.Ed.2d 205 (2005). The definition of a qualifying state offense under the ACCA is a matter of federal law. *Taylor*, 495 U.S. at 590-91, 110 S.Ct. 2143.

Florida, like Georgia, has a three-tiered scheme for punishing drug-related offenses. Under Florida law, those three tiers are the following: (1) possession of any amount of a controlled substance, Fla. Stat. § 893.13(6)(a); (2) possession with intent to distribute a controlled substance, § 893.13(1)(a); and (3) trafficking in cocaine by possession of 28 grams or more of the drug, § 893.135(1)(b). Under this third tier, trafficking in cocaine is further delineated according to the amount of drugs that the defendant possessed, and the sentence imposed increases accordingly. *See id.* James was convicted under this third tier for possession of between 200 and 400 grams of cocaine. Fla. Stat. § 893.135(1)(b)(1)(b).

Florida's three-tiered system for punishing drug crimes is nearly identical to Georgia's three-tiered scheme. Although *Madera-Madera* involved Georgia law, we see no reason to distinguish *Madera-Madera* from this appeal. We hold that Florida's drug trafficking statute also "infers an intent to

distribute once a defendant possesses a certain amount of drugs." *Madera-Madera*, 333 F.3d at 1232. In both Florida and Georgia, the defendant must be in possession of a significant quantity of drugs, namely 28 grams, before the state deems the offense to be "trafficking." Moreover, under both the Georgia and Florida schemes, drug trafficking is a more serious offense, and is punished more harshly, than either simple possession or possession with intent to distribute. *See Gibbs*, 698 So.2d at 1209 ("[T]he legislature intended that trafficking possession, which requires the possession of more than twenty-eight grams of cocaine, be punished more harshly than simple possession, which merely requires the possession of less than twenty-eight grams of any illegal drug."). Florida's three-tiered scheme for punishing drug crimes is not materially distinguishable from Georgia's, and therefore, our reasoning in *Madera-Madera* controls this case. Accordingly, Florida's drug trafficking statute necessarily infers an intent to distribute once a defendant possesses 28 grams or more.

Furthermore, it is not necessary that the Florida statute under which James was convicted include as an element of the offense an intent to manufacture or distribute cocaine in order for James to be sentenced under the ACCA, as the district court ruled. The language of the Florida statute need not exactly match the ACCA's definition of a "serious drug offense." *See Madera-Madera*, 333 F.3d at 1233 (explaining that the wording of the Georgia statute need not exactly match the wording of the Sentencing Guidelines because the Sentencing Commission did not define drug trafficking by its elements, but rather by the type of conduct prohibited). Rather, the question is whether the Florida statute falls within the ACCA's definition of a "serious drug offense." The definition broadly includes any offense "involving" the manufacture, distribution, or possession with intent to manufacture or distribute. 18 U.S.C. § 924(e)(2)(A)(ii). This "involving" language makes clear that the term "serious drug offense"

may include even those state offenses that do not have as an element the manufacture, distribution, or possession of drugs with intent to manufacture or distribute. Therefore, the Florida statute falls within the broad definition of a "serious drug offense."

Finally, James was convicted of trafficking, the most serious drug offense in Florida. To hold that this conviction does not qualify as a "serious drug offense" for purposes of the ACCA enhancement would create an anomaly. *See Madera-Madera*, 333 F.3d at 1233-34 (discussing the potential anomalous result if the defendant's trafficking offense did not qualify for enhancement under the Sentencing Guidelines). If James had been convicted in Florida of a lesser offense, such as possession with intent to distribute, he would qualify for enhanced sentencing under the ACCA. However, as the case stands now, James would not qualify for such enhanced sentencing because the Government charged James with—and James pled guilty to—a more serious trafficking offense. The district court recognized this anomaly at sentencing noting that, under its ruling, James's plea to a greater offense had ensured that he would be treated more—not less—leniently under the ACCA. Such an anomalous result would thwart the ACCA's purpose. *See United States v. Pope*, 132 F.3d 684, 691 (11th Cir.1998) (noting that the ACCA was intended to provide additional punishment for habitual offenders who Congress found to be responsible for the disproportionate number of violent crimes).

Here, James pled guilty to trafficking in cocaine by possession of between 200 and 400 grams of the drug. Florida's three-tiered scheme recognizes that someone who is in possession of between 200 and 400 grams of cocaine intends to manufacture and distribute, and thereby, "traffic" those drugs. Moreover, federal law permits an inference of intent to distribute from a defendant's possession of a significantly large quantity of drugs. *See United States v. Bain*, 736 F.2d

1480, 1486 (11th Cir.1984). *Gibbs v. State*, 698 So.2d 1206, does not require a contrary result because interpretation of the term "serious drug offense" is a matter of federal law as determined by the federal courts. *See Taylor*, 495 U.S. at 590-91. Accordingly, James's conviction for trafficking in cocaine by possession of between 200 and 400 grams of cocaine falls within the ACCA's definition of a "serious drug offense."

We hold that the district court erred when it found that James's conviction for trafficking in cocaine by possession was not a qualifying conviction under the ACCA. We further find below that the district court did not err when it held that James's conviction for attempted burglary is a qualifying conviction. Therefore, because James has three qualifying felony convictions, we vacate and remand, directing the district court to sentence James in accordance with the ACCA.

B. Whether Attempted Burglary of a Dwelling is a "Violent Felony"

James argues on cross-appeal that his Florida state conviction for attempted burglary is not a "violent felony" under § 924(e), and therefore, that the district court erred in counting that conviction as a qualifying conviction under the ACCA. The ACCA defines a "violent felony" as "any crime punishable by imprisonment for a term exceeding one year . . . that—(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B).

On appeal, James asserts that, under Florida law, attempted burglary does not fall within the definition of a "violent felony" because it does not pose a serious potential risk of physical injury to another. Instead, he argues, attempted

burglary poses merely "a risk of a risk." *United States v. Weekley*, 24 F.3d 1125, 1125 (9th Cir.1994).

In response, the Government relies on our precedent in *United States v. Wilkerson*, 286 F.3d at 1326 (quoting § 924(e)(2)(B)(ii), in which we established that an incohate crime qualified as a violent felony when its object involved conduct that "present[ed] a serious potential risk of physical injury to another.") In *Wilkerson*, we held that a conviction for conspiracy to commit robbery in violation of Florida law qualified as a "violent felony." *Id.* First, we reasoned that robbery itself was a "violent felony" under § 924(e)(2)(B) because it presented a serious risk of physical injury to another. *Id.* at 1325. We further reasoned that "a conspiracy that has as its object the offense of robbery likewise presents such a risk." *Id.* We noted that "[w]hen one reaches an agreement with a co-conspirator to commit a robbery, and formulates the intent to commit the robbery, his conduct presents at least a potential risk of physical injury within the meaning of § 924(e)(2)(B)(ii)." *Id.* at 1325-26.

Likewise, the Government cites *United States v. Rainey*, 362 F.3d 733 (11th Cir.2004) (per curiam), *cert. denied*, 541 U.S. 1081, 124 S.Ct. 2433, 158 L.Ed.2d 996 (2004), the case upon which the district court based its decision. In *Rainey*, we relied on *Wilkerson* to hold that a conviction for attempted arson under Florida law qualified as a "violent felony" under § 924(e)(2)(B)(ii). *Rainey*, 362 F.3d at 736. In *Rainey*, we noted that we had not previously decided whether an attempt to commit an enumerated felony under § 924(e) constituted a "violent felony." *Id.* at 735. However, following our reasoning in *Wilkerson*, we held that "[a]ttempt, like conspiracy, presents the potential risk of physical injury to another. Because attempted arson presents a serious potential risk of injury to another, we [held] that the district court correctly concluded that it [was] a violent felony under § 924(e)." *Id.* at 736. Moreover, in *United States v. Gunn*, 369 F.3d 1229,

1238 (11th Cir.2004) (per curiam), *cert. denied, Cantillo v. United States*, 543 U.S. 937, 125 S.Ct. 324, 160 L.Ed.2d 244 (2004), we held that attempted burglary is a "crime of violence" for purposes of United States Sentencing Guidelines Manual § 4B1.1(a)(2), reasoning that "[a]ttempted burglary presents a serious potential risk of physical injury to another. An uncompleted burglary does not diminish the potential risk of physical injury."

Relying on our precedent in *Wilkerson* and *Rainey*, we affirm the district court's ruling and hold that attempted burglary under Florida law is a "violent felony" under § 924(e)(2)(B). The district court ruled that, because burglary is an enumerated felony under § 924(e)(2)(B)(ii), and because under *Rainey* an attempt to commit an enumerated felony under § 924(e)(2)(B)(ii) constitutes a "violent felony," attempted burglary is also a "violent felony." We agree. We reject James's argument that attempted burglary merely poses "a risk of a risk" and instead hold that an attempt to commit burglary, like an attempt to commit arson, presents the potential risk of physical injury to another sufficient to satisfy the ACCA's definition of a "violent felony."

III. CONCLUSION

For the above reasons, we vacate James's sentence and remand, directing the district court to sentence James in accordance with the ACCA.

VACATED AND REMANDED.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FT. MYERS DIVISION

Case Number: 2:03-CR-72-FtM-29SPC
USM Number: 33689-018

UNITED STATES OF AMERICA

-vs-

ALPHONSO JAMES, JR.

Martin DerOvanesian, FPD
2110 First Street, Suite 2-146
Fort Myers, FL. 33901

JUDGMENT UPON REMAND IN A CRIMINAL CASE

The defendant pleaded guilty to Count One of the Indictment. Accordingly, the court has adjudicated that the defendant is guilty of the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 U.S.C. §§ 922(g)(1) and 924(e)	Felon in Possession of a Firearm	January 31, 2003	One

The defendant is re-sentenced following remand from the Eleventh Circuit as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984, as modified by *United States v. Booker*, 125 S. Ct. 738 (2005).

IT IS ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Date of Imposition of Sentence:
May 11, 2004
First Amended: May 18, 2004
Date of Re-Sentence: March 27, 2006

/s/ John E. Steele
JOHN E. STEELE
UNITED STATES DISTRICT JUDGE

March 28, 2006

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 180 Months.

The Court recommends to the Bureau of Prisons:

1. Participation in the 500 Hour Intensive Drug Treatment Program.

2. That the defendant be returned to his original institution; that being Coleman Florida.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By: _____
Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of Five (5) years. The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from custody of the Burçau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter.

The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervision that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervision in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;

2. The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4. The defendant shall support his or her dependents and meet other family responsibilities;

5. The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6. The defendant shall notify the probation officer at least ten (10) days prior to any change in residence or employment;

7. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9. The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11. The defendant shall notify the probation officer within seventy-two (72) hours of being arrested or questioned by a law enforcement officer;

12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

ADDITIONAL CONDITIONS OF SUPERVISED RELEASE

The defendant shall also comply with the following additional conditions of supervised release:

1. The defendant shall participate in a program (outpatient and/or inpatient) approved by the Probation Officer for treatment of narcotic addiction or drug or alcohol dependency and shall follow the Probation Officer's instructions regarding the implementation of this condition. This program may include testing for the detection of substance use or abuse not to exceed 104 tests per year. Further, the defendant shall be required to contribute to the costs of services for such treatment not to exceed an amount determined reasonable by the Probation Office's sliding scale for Substance Abuse Treatment Services. Upon completion of a drug or alcohol dependency treatment program the defendant is directed to submit to testing for the detection of substance use or abuse not to exceed 104 times per year.

2. Having been convicted of a qualifying felony offense, the defendant shall cooperate with the probation office in

the collection of DNA, if not collected by the Bureau of Prisons.

3. The defendant shall refrain from any unlawful use of a controlled substance, and shall submit to one drug test within 15 days of placement on supervised release and at least two periodic drug tests thereafter as directed by the probation officer. Based on the Court's determination that additional drug urinalysis is necessary, the Court authorizes random drug testing not to exceed 104 tests per year.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth in the Schedule of Payments.

Total Assessment	Total Fine	Total Restitution
$100.00 (if not previously paid)	Waived	N/A

The defendant shall pay interest on any fine or restitution of more than $2,500, unless the fine or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on the Schedule of Payments may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994 but before April 23, 1996.

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(1)

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SUPREME COURT, U.S.

No. 05-9264

IN THE

Supreme Court of the United States

ALPHONSO JAMES, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF PETITIONER

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August 17, 2006

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QUESTION PRESENTED

Whether the Eleventh Circuit erred by holding that all convictions in Florida for attempted burglary qualify as a violent felony under 18 U.S.C. § 924(e).

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OPINION BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is reported at 430 F.3d 1150 (11th Cir. 2005) (JA 44-54).

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit was issued on November 17, 2005. Petitioner timely filed a Petition for Writ of Certiorari on February 14, 2006. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be

> confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Section 922(g) of Title 18 to the United States Code provides in relevant part that:

> It shall be unlawful for any person . . . who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

Section 924(e) of Title 18 to the United States Code provides in relevant part that:

> (1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).
>
> (2) As used in this subsection— . . .
>
> (B) the term "violent felony" . . . means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another . . . .

Florida Statute § 777.04(1) (1994) provided in relevant part that:

> A person who attempts to commit an offense prohibited by law and in such attempt does any act toward the commission of such offense, but fails in the perpetration or is intercepted or prevented in the execution thereof, commits the offense of criminal attempt . . . .

Florida Statute § 810.02(1) (1994) provided that:

> "Burglary" means entering or remaining in a structure or a conveyance with the intent to commit an offense therein, unless the premises are at the time open to the public or the defendant is licensed or invited to enter or remain.

Florida Statute § 810.02(3) (1994) provided that:

> If the offender does not make an assault or battery or is not armed, or does not arm himself, with a dangerous weapon or explosive as aforesaid during the course of committing the offense and the structure or conveyance entered is a dwelling or there is a human being in the structure or conveyance at the time the offender entered or remained in the structure or conveyance, the burglary is a felony of the second degree, punishable as provided in § 775.082, § 775.083, or § 775.084. Otherwise, burglary is a felony of the third degree, punishable as provided in § 775.082, § 775.083, or § 775.084.

Florida Statute § 810.011(2) (1994) provided in relevant part that:

> "Dwelling" means a building or conveyance of any kind, either temporary or permanent, mobile or immobile, which has a roof over it and is designed to be occupied by people lodging therein at night, together with the curtilage thereof.

STATEMENT OF THE CASE

The Armed Career Criminal Act ("ACCA") is the product of Congress's determination to severely punish the possession of firearms by individuals convicted of three or more "violent felon[ies]" or "serious drug offense[s]." 18 U.S.C. § 924(e)(1). Such individuals face a fifteen-year mandatory minimum sentence for merely "possess[ing] . . . any firearm or ammunition." *Id.* § 922(g). But Congress carefully limited the ACCA's severe penalties by enumerating the precise types of crimes that would constitute predicate acts for these harsh penalties. In particular, a "violent felony" is restricted to a crime punishable by imprisonment of more than one year that either (1) "has as an element the use, *attempted* use, or threatened use of physical force against the person of another" or (2) "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." *Id.* § 924(e)(2)(B)(i)-(ii) (emphasis added).

The Eleventh Circuit's decision in this case offends these careful limitations by holding that any attempt to commit a crime enumerated in § 924(e)(2)(B)(ii) will itself automatically constitute a violent felony. This approach is inconsistent with the statute and with this Court's decisions in *Taylor* v. *United States*, 495 U.S. 575 (1990), and *Shepard* v. *United States*, 544 U.S. 13 (2005), both of which prohibit factual inquiries beyond those facts necessarily found by the jury or in the defendant's statements to the court.

Accordingly, this Court should reverse the Eleventh Circuit and remand to the District Court for resentencing.

On January 31, 2003, Petitioner Alphonso James, Jr. was stopped for driving an automobile with a defective taillight and a loudly playing stereo. During the stop, the officer detected an odor of marijuana and searched Petitioner's vehicle. The officer found a handgun and ammunition in the vehicle, and Petitioner was arrested. A subsequent indictment in the United States District Court for the Middle District of Florida charged Petitioner with one count of Possession of a Firearm and Ammunition by a Convicted Felon as an Armed Career Criminal, under 18 U.S.C. §§ 922(g)(1) and 924(e). JA 14-15. Petitioner pled guilty. JA 5. At sentencing, the prosecution argued that his jail term should be enhanced from the Guideline range of 51 to 71 months to the ACCA mandatory minimum of fifteen years. The prosecution claimed that Petitioner had been convicted of three prior felonies that qualified as either "violent felonies" or "serious drug offenses" under § 924(e): (1) a June 3, 1997 conviction under Florida Statutes §§ 777.04 and 810.02 for the attempted burglary of a dwelling, in the Circuit Court of the 20th Judicial Circuit in and for Lee County, Florida; (2) a January 28, 1998 conviction under Florida Statute § 893.135 for trafficking in illegal drugs, also in the Circuit Court of the 20th Judicial Circuit in and for Lee County, Florida; and (3) a June 29, 1998 conviction under Florida Statute § 893.135 for trafficking in cocaine, in the Circuit Court of the 17th Judicial Circuit in and for Brevard County, Florida. JA 14-15. Petitioner conceded that the January 1998 conviction for trafficking in illegal drugs satisfied the ACCA's standards for a sentence enhancement, but contested the designation of his conviction for attempted burglary as a "violent felony" and his conviction for trafficking in cocaine as a "serious drug offense." JA 21.

In determining whether Petitioner's conviction for attempted burglary of a dwelling was an ACCA predicate, the

District Court adhered to this Court's directive in *Taylor* and did not examine the specific facts of Petitioner's conviction. Instead, the District Court focused solely on the definition of attempted burglary under Florida law. The discussion at sentencing therefore centered on the findings required under Florida law for an attempted burglary conviction.

Both at the time of Petitioner's 1997 conviction and at present, Florida law required proof of two elements for criminal attempt: "a specific intent to commit a particular crime, and an overt act toward its commission." *Thomas* v. *State*, 531 So. 2d 708, 710 (Fla. 1988) (footnote omitted); see Fla. Stat. § 777.04(1) (1994).[1] Relying on precedent from the Florida Supreme Court that broadly defined the scope of acts sufficient for a conviction for attempted burglary, Petitioner argued that under Florida law, a conviction for attempted burglary could be based upon conduct that did not "present[] a serious potential risk of physical injury to another," and therefore that such a conviction was not a violent felony under the ACCA. JA 23-24.

The prosecution argued that convictions for attempted burglary in Florida are limited to instances where a person enters or attempts to enter a structure with the intent of committing an offense therein. JA 27 ("You've got to attempt to go into the structure"). Ignoring the statutory language in Florida that allows "any act" to constitute a basis for a criminal attempt conviction and without citing to Florida law, the prosecution asserted that attempted burglary in

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[1] Because Petitioner's 1997 conviction was based on conduct that occurred in 1994, the elements of his 1997 conviction are controlled by Florida law in 1994. *See* JA 14 (docket number for 1997 conviction is "94-2197CF"); *State* v. *Smith*, 547 So. 2d 613, 616 (Fla. 1989) (per curiam) ("[T]he statutes in effect at the time of commission of a crime control as to the offenses for which the perpetrator can be convicted, as well as the punishments which may be imposed."). While the differences between the 1994 Florida law of attempted burglary and current Florida law are not material to this case, Petitioner will rely on the 1994 statutes.

Florida constituted a violent offense because "not only do you commit an act towards the commission of the offense, you have to actually attempt to commit the offense." JA 27. Recognizing that Florida law does not make such a distinction and defines an attempt based on the presence of an overt act, the District Court expressed strong doubt "that the Florida attempt statute punishes only conduct with a severe potential risk of physical injury to another."[2] JA 33.

The District Court, however, considered itself bound by the Eleventh Circuit's ruling in *United States* v. *Rainey*, 362 F.3d 733 (11th Cir.) (per curiam), *cert. denied*, 541 U.S. 1081 (2004). In *Rainey*, the Eleventh Circuit found that an attempt to commit arson constituted a violent felony under Florida law. See *id.* at 735-36. Despite the District Court's misgivings regarding the statutory elements of attempted burglary, it held that *Rainey* established a *per se* rule that an attempt to commit any enumerated felony under the ACCA constituted a "violent felony" for purposes of a sentence enhancement. JA 34. Based upon this reading of binding Eleventh Circuit precedent, the District Court found that attempted burglary was a violent felony despite its recognition that under Florida law attempted burglary does not just punish conduct with a "serious potential risk of physical injury to another."

The District Court ultimately concluded, however, that Petitioner's prior convictions were insufficient to warrant an ACCA enhancement because his June 1998 conviction for trafficking in cocaine did not constitute a "'serious drug offense.'" JA 45-46. The District Court held that under Florida law, a conviction for trafficking does not involve any intent to distribute. JA 46. Therefore the District Court found that Petitioner had only two predicate offenses that

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[2] The District Court further noted that "[y]ou just read the attempt statute in Florida law and it talks about any act. It doesn't say any act that has a severe potential for physical risk of injury to another." JA 26.

counted toward the ACCA enhancement rather than the required three, and it sentenced him consistent with the federal sentencing guidelines to a 71-month prison term. JA 37.

The prosecution appealed the District Court's refusal to find that his June 1998 conviction qualified as a predicate crime for ACCA purposes, and Petitioner cross-appealed regarding the District Court's holding as to the June 1997 conviction for attempted burglary. The Eleventh Circuit reversed with respect to the ruling on the cocaine trafficking conviction, holding that Florida necessarily infers an intent to distribute when the quantity of drugs reaches a certain level. JA 47-52. The Court of Appeals then affirmed the District Court's ruling that attempted burglary constitutes a "violent felony" under the ACCA. Relying—like the District Court—on its opinion in *Rainey*, the Eleventh Circuit held that any attempt to commit an enumerated felony under § 924(e)(2(B)(ii) is as much a violent felony under the ACCA as the enumerated offenses themselves. See JA 54. The Court of Appeals concluded that any attempt to commit an enumerated felony presents sufficient potential risk of physical injury to be deemed a violent felony. JA 54. While the Eleventh Circuit's reasoning was not entirely clear, its holding appeared to be based on a conclusion that attempted burglary is a crime that "involves conduct that presents a serious potential risk of physical injury to another" and therefore falls within § 924(e)(2(B)(ii)'s residual clause. See JA 54 ("'An uncompleted burglary does not diminish the potential risk of physical injury'").[3] The Eleventh Circuit

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[3] In a recent decision, the Eleventh Circuit suggested that its *per se* rule might be based on the assumption that the enumeration of felonies in § 924(e)(2)(b)(ii) necessarily includes attempts to commit those felonies, rather than on the conclusion that attempts fall within the residual clause. *See United States* v. *Wade*, __ F.3d ___, 2006 WL 2195284, at *4 (11th Cir. Aug. 4, 2006) ("Our *James* and *Rainey* decisions establish that if an

remanded the case to the District Court for resentencing in accordance with the ACCA mandatory minimum of fifteen years of imprisonment. The District Court imposed that fifteen-year sentence on March 28, 2006.[4] JA 55-57.

SUMMARY OF ARGUMENT

The Eleventh Circuit in this case conducted judicial fact finding to enhance Petitioner's sentence, and in the process established a *per se* rule that all Florida attempted burglary of dwelling convictions qualify as violent felonies under the ACCA. This *per se* rule is irreconcilable with the plain language of the statute and flouts the Court's decisions in *Taylor* v. *United States*, 495 U.S. 575 (1990), and *Shepard* v. *United States*, 544 U.S. 13 (2005).

The ACCA defines a violent felony as a crime that "(i) has as an element the use, attempted use, or threatened use of physical force against the person of another" or "(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B). According to the Eleventh Circuit, any attempt to commit one of the offenses enumerated in § 924(e)(2)(B)(ii) is automatically a violent felony. This *per se* rule is a gross misreading of the statute, because "burglary" in § 924(e)(2)(B)(ii) does not encompass attempted burglary. Attempted burglary in Florida simply does not require proof of the elements required to prove generic burglary: namely, "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." *Taylor*, 495 U.S. at 598. By definition, a defendant may only be convicted of attempted burglary of a dwelling in Florida if

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offense is an enumerated violent felony under § 924(e)(2)(B)(ii), then the crime of attempting to commit that offense is also a violent felony").

[4] The District Court entered the new sentence while Petitioner's petition for a writ of certiorari was pending before this Court.

he fails to complete the offense of entering or remaining in the dwelling. As a result, a conviction for attempted burglary of a dwelling necessarily precludes a finding that the defendant actually succeeded in unlawfully entering the dwelling. Thus, under Florida law and the ACCA, burglary and attempted burglary are mutually exclusive.

Attempted burglary of a dwelling also does not categorically "involve[] conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(ii). The structure of § 924(e)(2)(B) demonstrates conclusively that Congress did not intend to include attempted burglary as a predicate offense. The juxtaposition of § 924(e)(2)(B)(i), which includes attempts, and § 924(e)(2)(B)(ii), which does not, shows that Congress made a deliberate choice not to include attempted burglary. *Ejusdem generis* principles also support this conclusion, because the residual clause of § 924(e)(2)(B)(ii) follows a list of completed offenses. It too should be read to apply only to completed offenses.

Even assuming Congress intended to include inchoate offenses under the catchall or residual provision, attempted burglary of a dwelling under Florida law is not such an offense. In keeping with *Taylor*'s categorical approach, attempted burglary could only constitute the required risk under § 924(e)(2)(B)(ii) if a conviction for attempted burglary necessarily involves conduct "present[ing] a serious potential risk of physical injury to another." *Id.* An offense for attempted burglary in Florida does not involve such conduct for several reasons. First, Florida's attempt statute requires only minimal action on the part of the defendant. Merely being present in the vicinity, coupled with the intent to commit the crime, is a sufficient act to constitute an attempt. In the same vein, Florida has found attempts where several steps remained before the defendant could complete the crime. Second, burglary is a property crime, not a crime against the person. Although Congress included burglary as

an enumerated offense, one of the primary reasons it did so was its belief that a burglar's entry into a building could create a risk to others. In Florida, however, a person can be found guilty of burglary of a dwelling even if he did not enter the dwelling, as Florida defines burglary of a dwelling to include the curtilage of the dwelling. "[S]tealing apples from a neighbor's backyard would be counted as a burglary under Florida's statute." *United States* v. *Pluta*, 144 F.3d 968, 975-76 (6th Cir. 1998). Combining Florida's expansive definition of burglary and its low threshold for establishing an attempt precludes any finding that an attempted burglary of a dwelling conviction in Florida "involves conduct that presents a serious potential risk of physical injury to another."

In addition to its erroneous interpretation of the plain language of the statute and this Court's decision in *Taylor*, the approach adopted by the Eleventh Circuit raises grave constitutional questions under the Fifth and Sixth Amendments. These amendments guarantee that a criminal conviction must "rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *United States* v. *Gaudin*, 515 U.S. 506, 510 (1995). Additionally, the Court has held: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000). In this case, no jury has ever found that Petitioner's attempted burglary of a dwelling conviction involved conduct presenting any risk of physical injury to another, let alone a substantial risk. Thus, the doctrine of constitutional avoidance dictates that § 924(e)(B)(2) be interpreted to prohibit judicial fact finding, and in particular the type of fact finding the Eleventh Circuit employed by creating a *per se* rule.

In this case, the Eleventh Circuit has ignored the Court's straightforward holding in *Taylor* and has instead employed

an impermissible factual inquiry approach into the conduct underlying Petitioner's prior conviction for attempted burglary of a dwelling. For this reason the Eleventh Circuit's *per se* rule cannot stand. Finally, if there were any doubt about whether attempted burglary convictions were encompassed by § 924(e), the rule of lenity requires that it be resolved in favor of Petitioner.

ARGUMENT

ATTEMPTED BURGLARY IS NOT A VIOLENT FELONY UNDER 18 U.S.C. § 924(E)(2)(B).

The Eleventh Circuit's decision in this case establishes a *per se* rule: *any* attempt to commit a crime enumerated in 18 U.S.C. § 924(e)(2)(B)(ii) will be treated as a predicate felony for ACCA enhancement purposes. This *per se* rule is wholly inconsistent with the language of the statute and with the approach this Court outlined in *Taylor* and *Shepard.*

In *Taylor*, this Court recognized that sentencing courts must use "a formal categorical approach" to determine whether a prior offense is an ACCA predicate, "looking only to the statutory definitions of the prior offenses, and not the particular facts underlying those convictions." *Taylor*, 495 U.S. at 600. The prior conviction at issue in *Taylor* was a Missouri conviction for burglary. This Court confronted the question of whether this state conviction qualified as a "burglary" under § 924(e)(2)(B)(ii). The term "burglary" is not defined in the ACCA, but this Court held that Congress intended it to reflect a "generic, contemporary meaning of burglary," which this Court defined as "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." *Id.* at 598.

This Court recognized that many states have statutes that define burglary more broadly than this generic definition, such as by "eliminating the requirement that the entry be unlawful, or by including places, such as automobiles and

vending machines, other than buildings." *Id.* at 599. Burglary convictions under these statutes are therefore not categorically "burglary" for ACCA purposes. For states with such statutes, however, a conviction can still qualify as a § 924(e)(2)(B)(ii) predicate if the "jury was actually required to find all the elements of generic burglary." *Id.* at 602. To make this determination, the sentencing court is permitted to examine the charging document and jury instructions to determine whether a prior conviction was for generic burglary. If the jury was actually required to find all of the elements of generic burglary in order to convict—for example, if the jury was required to find an unlawful entry into a building with intent to commit a crime—the conviction can be used for enhancement. *Id.*

In *Shepard*, this Court reaffirmed *Taylor*'s holding that sentencing courts may not engage in fact finding to determine whether a prior conviction qualifies as an ACCA predicate. In *Shepard*, the defendant had been convicted of several breaking and entering offenses in Massachusetts, which defines breaking and entering more broadly than generic burglary. See *Shepard*, 544 U.S. at 17. The First Circuit held that a sentencing court may examine police reports to determine whether Shepard's prior convictions were actually for generic burglary. See *id.* at 18. This Court rejected that approach, holding that courts determining whether an offense qualified under § 924(e) could rely only upon "conclusive records made or used in adjudicating guilt," such as charging documents, jury instructions, or plea colloquies. *Id.* at 20-21. Under the categorical approach of *Taylor* and *Shepard*, therefore, the critical question is whether the "statutory definition of the prior offense" falls within the ACCA definition.

The Eleventh Circuit's *per se* rule that all attempts to commit offenses listed in § 924(e)(2)(B)(ii) are necessarily violent felonies is irreconcilable with *Taylor*, *Shepard*, and with the plain language of the ACCA. Congress has stated

unambiguously which attempted crimes can be treated as ACCA predicate felonies, and attempted burglary is not one of them. The Eleventh Circuit's decision to graft attempts into Congress's carefully crafted definition is a gross misinterpretation of the statute. Even if attempts could be ACCA predicates under § 924(e)(2)(B)(ii), attempted burglary under Florida law is simply not the sort of crime that "involves conduct that presents a serious potential risk of physical injury to another." Florida law embodies both a uniquely broad definition of burglary and a remarkably low threshold to prove attempted burglary. As a result, the requisite conduct for a Florida conviction for attempted burglary does not come close to "conduct that presents a serious potential risk of physical injury to another." Moreover, interpreting § 924(e)(2)(B)(ii)'s residual clause to permit courts to inquire into whether the typical conduct by which attempted burglary is committed creates a serious potential risk to others raises serious constitutional concerns, and the statute should be read so as to avoid those concerns.

A. Attempted Burglary is Not "Burglary."

To constitute a violent felony for ACCA enhancement purposes, Petitioner's 1997 conviction for attempted burglary must be "burglary, arson, or extortion, involve[] use of explosives, or otherwise involve[] conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(ii).[5] Before the Eleventh Circuit, the United States maintained that Petitioner's attempted burglary conviction was an enumerated "burglary" under § 924(e)(2)(B)(ii).[6] This contention can be rejected out of

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[5] The attempted burglary conviction unquestionably does not satisfy § 924(e)(2)(B)(i), which only applies to offenses that "ha[ve] as an element the use, attempted use, or the threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i).

[6] It is not clear whether the decision in the instant case accepted this contention or instead held that attempts are encompassed within

hand. "Burglary" in § 924(e)(2) means "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." *Taylor*, 495 U.S. at 598. A Florida conviction for attempted burglary plainly would not require these elements. The conduct Florida requires for attempted burglary can stop well short of "entry" into a building or structure. *See infra* pp. 20-28.

Indeed, in Florida a defendant may only be convicted of attempting an offense if he *failed* to complete the offense. Florida Statute § 777.04 only applies when a defendant "fails in the perpetration or is intercepted or prevented in the execution" of the attempted offense. As a result, a conviction for attempted burglary necessarily precludes a finding that the defendant actually succeeded in unlawfully entering a building. Cf. *State* v. *Ortiz*, 766 So. 2d 1137, 1143 (Fla. 3d Dist. Ct. App. 2000) ("By its nature, attempt occupies the conceptual area between the non-commission of the greater offense and the completion of the greater offense itself"). Under Florida law, burglary and attempted burglary are not synonymous. They are mutually exclusive.

The same is true of all of the enumerated felonies of § 924(e)(2)(B)(ii). None encompass inchoate crimes that have those felonies as their object. When Congress wanted to include an inchoate crime as an ACCA predicate, it did so in plain English. For instance, § 924(e)(2)(B)(i) includes both offenses that have as an element "the use" of physical force against another person and offenses that have as an element "the attempted use" of such force. § 924(e)(2)(B)(i). If the enumerated felonies in § 924(e)(2)(B)(ii) included attempted felonies, Congress's specific inclusion of felonies involving

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§ 924(e)(2)(B)(ii)'s residual clause. A recent Eleventh Circuit decision appears to accept the premise that the enumerated felonies of § 924(e)(2)(B)(ii) somehow encompass inchoate offenses aimed at committing those felonies. *See Wade*, 2006 WL 2195284, at *4 ("[I]f an offense is an enumerated violent felony under § 924(e)(2)(B)(ii), then the crime of attempting to commit that offense is also a violent felony").

the "attempted use" of physical force would be superfluous. See *TRW Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001) ("It is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant'") (quoting *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001)).

It is particularly unreasonable to equate "burglary" with "attempted burglary" when Florida law treats those two offenses so differently. While a conviction for a completed burglary of a dwelling is a second degree felony punishable by up to fifteen years of incarceration, a conviction for an attempted burglary of a dwelling is only a third degree felony punishable by up to five years of incarceration. See Fla. Stat. § 777.04(4)(e) (1994) (providing that attempts to commit second degree felonies are third degree felonies)[7]; *id.* § 775.082(3)(c)-(d) (1994) (prescribing sentences for second and third degree felonies); *id.* § 810.02(3) (1994) (providing that burglary of a dwelling is a second degree felony). If Petitioner had been convicted of burglarizing a dwelling in 1997, he would have faced a fifteen-year maximum sentence—three times the sentence he faced for attempted burglary. Moreover, attempts are treated less seriously than completed crimes for purposes of Florida's sentencing guidelines and for determining an inmate's eligibility for "gain-time" under Florida Statute § 944.275. See Fla. Stat. § 777.04(4)(a) (2006).[8] Florida has made a legislative judgment to set a low threshold for attempted burglaries and to correspondingly punish an attempted burglary of a dwelling less severely than a completed burglary of a

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[7] The statutory provision that provides that attempts to commit second degree felonies are treated as third degree felonies was codified at Fla. Stat. § 777.04(4)(e) in 1994 and is currently codified at § 777.04(4)(d).

[8] *See also* Fla. Stat. § 921.0012 (1994) (classifying attempted burglary as a Level 4 offense for purpose of Florida sentencing guidelines and burglary of a dwelling as a more serious Level 7 offense).

dwelling. This judgment should not be disregarded by a mechanical claim that Florida burglary convictions are somehow equivalent to Florida attempted burglary convictions for ACCA purposes.

B. Attempted Burglary Does Not Categorically "Involve[] Conduct That Presents A Serious Potential Risk Of Physical Injury To Another."

1. The Plain Language of § 924(e)(2)(B)(ii) Does Not Include Attempts.

Not only is attempted burglary not "burglary" under § 924(e)(2)(B)(ii), it does not fall within § 924(e)(2)(B)(ii)'s residual clause, either. According to the Eleventh Circuit, attempted burglary—along with an attempt or conspiracy to commit *any* of the predicate acts listed in § 924(e)(2)(B)(ii)—automatically falls within the statute's residual clause because it "involves conduct that presents a serious potential risk of physical injury to another." JA 54 ("[A]n attempt to commit an enumerated felony under § 924(e)(2)(B)(ii) constitutes a 'violent felony'"). This approach fundamentally misreads the statute and flies in the face of the categorical logic of *Taylor*.

First, the structure of § 924(e)(2)(B) demonstrates conclusively that Congress did not intend to include attempted burglaries as predicate offenses. See *United Savs. Ass'n of Tex.* v. *Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988) ("A provision that may seem ambiguous by isolation is often clarified by the remainder of the statutory scheme"). When Congress wanted to list attempts as ACCA predicate felonies, it did so explicitly. For example, in § 924(e)(2)(B)(i), Congress included as violent felonies offenses that have "as an element the use, *attempted use*, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i) (emphasis added). The very next clause omits this attempt language, instead listing only completed offenses: "burglary," "arson," "extortion," and crimes "involv[ing] use of explosives." *Id.*

§ 924(e)(2)(B)(ii). The juxtaposition of § 924(e)(2)(B)(i), which includes attempts, and § 924(e)(2)(B)(ii), which does not, shows that Congress made a "deliberate choice" not to include attempted burglary. *Barnhart* v. *Peabody Coal Co.*, 537 U.S. 149, 168 (2003); see *Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("'Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'").[9]

Moreover, reading the residual clause of § 924(e)(2)(B)(ii) to encompass all attempts to commit enumerated felonies that "otherwise involve[] conduct that presents a serious potential risk of physical injury to another" gives that clause an unduly broad scope. Words are known by the company they keep, and the meaning of "otherwise involves conduct that presents a serious potential risk of physical injury to another" must be interpreted by the terms that precede it—all of which describe completed offenses. The maxim of *ejusdem generis* counsels that, "'[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.'" *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 114-15 (2001). Therefore, when "several items in a list share an attribute," *ejusdem generis* "counsels in favor of interpreting the other items as possessing that attribute as well." *Beecham* v. *United States*, 511 U.S. 368, 371 (1994). This principle is particularly applicable to general catchall and residual clauses at the end of a statutory list, which ought not to be read as opportunities to insert substantially different items into the statute but instead "as bringing within a statute categories

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[9] *See also* Br. for the United States in Opp. to Pet. for Cert. at 8, *James* v. *United States*, No. 05-9264 (filed May 8, 2006) (arguing that differences in definitions of predicate felonies in § 924(e)(2) indicates that Congress used disparate phrases "intentionally and purposely").

similar in type to those specifically enumerated." *Federal Mar. Comm'n* v. *Seatrain Line, Inc.*, 411 U.S. 726, 734 (1973); see also *Circuit City*, 532 U.S. at 114-15; *Hughey* v. *United States*, 495 U.S. 411, 419 (1990).

Here, the common attribute of the predicate felonies in § 924(e)(2)(B)(ii) is completion. The statute lists burglary, arson, extortion, and crimes involving the use of explosives—not attempted burglary, attempted arson, attempted extortion, or crimes involving the attempted use of explosives. Having only enumerated completed crimes, it makes little sense to read the catchall clause as encompassing inchoate crimes. Instead, this Court should interpret the final item of § 924(e)(2)(B)(ii) to have the same attributes as all the other items—namely, completion. *Beecham*, 511 U.S. at 371.

Congress's deliberate choice to exclude attempted burglaries from § 924(e)(2)(B)(ii) is reemphasized by the fact that in 1984 it rejected a version of the ACCA that would have included attempted burglaries. The original Senate version of the ACCA provided enhanced penalties for using a firearm by persons with two prior convictions for "any robbery or burglary offense, or a conspiracy or attempt to commit such an offense." S. 52, 98th Cong. § 2 (1984), *available at* 130 Cong. Rec. 3100 (1984). The Senate passed this version on February 23, 1984. The House did not adopt a parallel version of S. 52, however. Instead, the House adopted H.R. 6248, which explicitly borrowed some language from S. 52 but did *not* include inchoate crimes.[10] H.R. 6248

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[10] The final version of the ACCA borrowed the definitions of robbery and burglary from S. 52. *Compare* S. 52, 98th Cong. § 2 (1984) ("'[B]urglary offense' means any offense involving entering or remaining surrep-titiously within a building that is the property of another with intent to engage in conduct constituting a Federal or State offense"), *with* Armed Career Criminal Act of 1984, Pub. L. No. 98-473, ch. 18, § 1803, 98 Stat. 2185, 2185 ("'[B]urglary' means any felony consisting of entering or remaining surreptitiously within a building that is property of another with intent to engage in conduct constituting a Federal or State offense"). This

applied only to "robbery or burglary, or both." H.R. 6248, 98th Cong. § 2 (1984), *available at* 130 Cong. Rec. 28095 (1984). The Senate adopted the House version on October 4, 1984, and that version became the final ACCA. See Armed Career Criminal Act of 1984, Pub. L. No. 98-473, ch. 18, 98 Stat. 2185. Congress's clear decision to reject the original Senate language and to omit attempted burglary from the final version of the ACCA is a powerful indication that in 1984, it did not intend attempted burglaries to be used as predicate felonies. Congress's 1986 replacement of the "robbery or burglary" language reveals the same intent. While the 1986 revision added attempted robberies as ACCA predicates (by including offenses involving the "attempted use" of physical force in § 924(e)(2)(B)(i)), Congress did not add attempted burglaries to § 924(e)(2)(B)(ii). Career Criminals Amendment Act of 1986, Pub. L. No. 99-570, § 1402, 100 Stat. 3207, 3207-40. This choice demonstrates that attempted burglaries are simply not encompassed by § 924(e)(2)(B)(ii).

2. Attempted Burglary Under Florida Law Is Not Categorically An Offense That "Involves Conduct That Presents a Serious Potential Risk of Physical Injury To Another."

Even if inchoate offenses could be found to "involve[] conduct that presents a serious potential risk of physical injury to another" within the meaning of § 924(e)(2)(B)(ii), attempted burglary under Florida law is not such an offense. In keeping with the ACCA's categorical approach, attempted burglary could only constitute "conduct that presents a serious potential risk of physical injury to another" if a conviction for attempted burglary *necessarily* involves such conduct. Attempted burglary cannot meet that test, particularly given

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borrowing was acknowledged in the committee report on H.R. 6248. *See* H.R. Rep. No. 98-1073, at 6 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3661, 3666 (noting that bill's definitions of robbery and burglary "are consistent with S. 52 as passed by the Senate").

Florida's expansive definition of burglary and its low standard for establishing criminal attempt.

At the time of Petitioner's conviction for attempted burglary, Florida law defined burglary as "entering or remaining in a structure or a conveyance with the intent to commit an offense therein, unless the premises are at the time open to the public or the defendant is licensed or invited to enter." Fla. Stat. § 810.02(1) (1994).[11] This definition is significantly broader than the generic burglary of the ACCA. First, the Florida statute criminalizes the entry of "conveyance[s]" with the intent to commit an offense therein—not just the entry of "a building or other structure." *Id.* Moreover, under Florida law "dwelling" and "structure" are broad terms that include both the physical building *and* "the curtilage thereof." *Id.* § 810.011 (1)-(2) (1994). Florida law therefore "expands the definition of burglary to include not only buildings, but also the grounds around the buildings." *State* v. *Hamilton*, 660 So. 2d 1038, 1041 (Fla. 1995). Florida standard jury instructions reflect this broad definition. See Florida Standard Jury Instructions in Criminal Cases, 13.1. Burglary (4th ed. 2002) ("'Structure' means any building of any kind, either temporary or permanent, that has a roof over it, *and the enclosed space of ground and outbuildings immediately surrounding that structure*") (emphasis added).[12]

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[11] In 2001 Florida revised § 810.01(1) to include situations where a defendant who has been licensed or invited to enter remains "[s]urreptitiously, with the intent to commit an offense therein," remains "[a]fter permission to remain therein has been withdrawn, with the intent to commit an offense therein," or remains "[t]o commit or attempt to commit a forcible felony." Fla. Stat. § 810.02(b)(2) (2006); *see* 2001 Fla. Sess. Law Serv. 2001-58 (West).

[12] Florida standard jury instructions are published under the authority of the Florida Supreme Court and "are presumed to be correct" by Florida courts. *See Bell South Telecomms., Inc.* v. *Meeks*, 863 So. 2d 287, 292 (Fla. 2003).

Under the common law, burglary required entry into a dwelling house or entry into another structure located within the curtilage of a dwelling house. See 3 Wayne R. LaFave, *Substantive Criminal Law* § 21.1 (2d ed. 2003); William Blackstone, 4 *Commentaries* *225 ("And if the barn, stable, or warehouse be parcel of the mansionhouse, though not under the same roof or contiguous, a burglary may be committed therein; for the capital house protects and privileges all its branches and appurtenants, if within the curtilage or homestall"). Burglary necessarily required entry into a *building* within the curtilage—"the breaking of the curtilage itself was not an offense." 3 LaFave, *supra* § 21.1. In Florida, however, entry into the curtilage alone will suffice. To be considered "curtilage," the grounds surrounding a building need only have "some form of an enclosure." *Hamilton*, 660 So. 2d at 1044.[13] Therefore, under Florida law, a defendant can commit burglary by entering a gate or crossing a fence surrounding a structure *even if he never enters the structure itself.* "Entry onto the curtilage is, for the purposes of the burglary statute, entry into the structure or dwelling." *Baker* v. *State*, 636 So. 2d 1342, 1344 (Fla. 1994).[14] As a result, "stealing apples from a neighbor's

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[13] Florida's interpretation of "curtilage" for purposes of its burglary statute is therefore distinct from the four-factor test for "curtilage" that this Court has articulated for Fourth Amendment purposes. *See United States* v. *Dunn*, 480 U.S. 294, 301 (1987).

[14] *See, e.g.*, *Henderson* v. *State*, 810 So. 2d 999, 1001 (Fla. 4th Dist. Ct. App. 2002) (holding that defendant committed burglary by entering carport before he attempted to enter home); *State* v. *Burston*, 693 So. 2d 600, 601 (Fla. 2d Dist. Ct. App. 1997) (holding that open carport consisting of concrete slab and roof supported by four poles was part of curtilage); *Baker* v. *State*, 622 So. 2d 1333, 1335 (Fla. 1st Dist. Ct. App. 1993) (holding that defendant committed burglary by crossing fence into yard), *aff'd*, 636 So. 2d 1342 (Fla. 1994); *State* v. *Rolle*, 577 So. 2d 997, 998 (Fla. 4th Dist. Ct. App. 1991) (per curiam) (holding that defendant committed burglary by driving truck through gate and backing in through garage door); *Greer* v. *State*, 354 So. 2d 952, 953 (Fla. 3d Dist. Ct. App.

backyard would be counted as a burglary under Florida's statute." *Pluta*, 144 F.3d at 975-76.

Florida's extension of burglary from structures to the surrounding curtilage appears to be unique. See *Hamilton*, 660 So. 2d at 1041 ("No other state has applied curtilage in the manner Florida seeks to treat it") (internal quotation marks omitted). For example, the Model Penal Code restricts burglary to "a building or occupied structure." Model Penal Code § 221.1(1). Generic burglary for ACCA purposes similarly extends only to "a building or other structure." *Taylor*, 495 U.S. at 598. Therefore, Florida's burglary statute is unquestionably non-generic. See *Pluta*, 144 F.3d at 975; *United States* v. *Adams*, 91 F.3d 114, 115-16 (11th Cir. 1996) (per curiam).

Florida does not have a statute specifically setting forth the elements of attempted burglary. Instead, attempted burglary convictions are governed by Florida's general attempt statute, Florida Statute § 777.04. Section 777.04 provides that "[a] person who attempts to commit an offense prohibited by law and in such attempt does *any act* toward the commission of such offense, but fails in the perpetration or is intercepted or prevented in the execution thereof, commits the offense of criminal attempt." Fla. Stat. § 777.04(1) (emphasis added). Florida courts have interpreted this to require "two general elements to establish an attempt: a specific intent to commit a particular crime, and an overt act toward its commission." *Thomas*, 531 So. 2d at 710 (footnote omitted). In addition,

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1978) (holding that defendant committed burglary by climbing six-foot wall into enclosed parking area); *T.J.T.* v. *State*, 460 So. 2d 508, 509 (Fla. 3d Dist. Ct. App. 1984) (holding that defendant committed burglary by entering fenced-in yard); *Tobler* v. *State*, 371 So. 2d 1043, 1045 (Fla. 1st Dist. Ct. App. 1979) (holding that defendant committed burglary by cutting off lock and entering gate to fence surrounding a business); *DeGeorge* v. *State*, 358 So. 2d 217, 219-20 (Fla. 4th Dist. Ct. App. 1978) (holding that defendant committed burglary by entering paved area partially enclosed by a fence and a brick wall).

"[t]he intent and the act must be such that they would have resulted, except for the interference of some cause preventing the carrying out of the intent, in the completed commission of the crime." *Ortiz*, 766 So. 2d at 1143.

The necessary "overt act" can be any "outward act in manifest pursuance of a design or intent to commit a particular crime." *Morehead* v. *State*, 556 So. 2d 523, 524 (Fla. 5th Dist. Ct. App. 1990). This act need not be a "substantial step" toward the crime, as required by the Model Penal Code and many states. See *Hudson* v. *State*, 745 So. 2d 997, 1000 n.3 (Fla. 2d Dist. Ct. App. 1999) (noting that Model Penal Code "has not been adopted in Florida" and refusing to adopt "substantial step approach" to attempt). Indeed, the Eleventh Circuit itself has recognized that Florida's use of an "overt act" standard instead of a "substantial step" standard permits Florida convictions for attempted burglaries based on conduct less "far[] advanced toward completion of the offense of burglary" than would be required in "substantial step" jurisdictions. *United States* v. *Wade*, __ F.3d __, 2006 WL 2195284, at *4 (11th Cir. Aug. 4, 2006). Nor does Florida law require a "dangerous proximity" to completion, as some states do. See *United States* v. *Andrello*, 9 F.3d 247, 249 (2d Cir. 1993) (per curiam) (discussing New York law requiring "dangerous proximity" for attempts). Instead, all that is required is "some overt act toward the commission of the [offense] which goes beyond merely thinking or talking about it." *Thomas*, 531 So. 2d at 710.

This broad definition of attempt can be satisfied in many ways. Florida courts have found attempts when a defendant breaks off criminal activity because of his suspicions that police are present[15] or his decision that the crime would not

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[15] *See Webber* v. *State*, 718 So. 2d 258, 259 (Fla. 5th Dist. Ct. App. 1998) (holding that defendant was guilty of attempted dealing in stolen property where he set up deal to sell stolen credit cards, arrived at

be profitable.[16] If a defendant has stated an intention to commit the offense, his mere presence in the vicinity is sufficient to constitute attempt.[17] In the same vein, Florida has found attempts where several steps remained before the defendant could complete the crime.[18] Indeed, a defendant could be guilty of attempt even if completion of the offense were impossible. For example, in *State* v. *Cohen*, 409 So. 2d 64, 64-65 (Fla. 1st Dist. Ct. App. 1982) (per curiam), the court found that a defendant could be convicted for attempted sale of cocaine even though the substance the defendant allegedly sold was not cocaine.[19]

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designated meeting place, and immediately left upon becoming suspicious; "[t]he overt act . . . [was defendant's] arrival at or in the vicinity of the gas station, shortly after the appointed time, with the credit cards in his possession").

[16] *See State* v. *Wise*, 464 So. 2d 1245, 1246-47 (Fla. 1st Dist. Ct. App. 1985) (finding attempted cocaine trafficking where defendant refused to accept price offered by undercover officer for drugs and broke off negotiations).

[17] *See Smith* v. *State*, 632 So. 2d 644, 646 (Fla. 1st Dist. Ct. App. 1994) (finding attempt to handle, fondle, or assault a child in a lewd, lascivious, or indecent manner where defendant made suggestive remarks to girls and drove past them four times; "the appellant's act of repeatedly driving back by the girls can properly be viewed as a direct act" to support attempt conviction); *Mercer* v. *State*, 347 So. 2d 733, 735 (Fla. 4th Dist. Ct. App. 1977) (finding attempted robbery where defendant stated intent to rob store at particular time, arrived at store at that time, and asked to see manager).

[18] For example, in *State* v. *Coker*, 452 So. 2d 1135, 1137 (Fla. 2d Dist. Ct. App. 1984), the defendant was convicted for attempted possession of a controlled substance where his only overt act was to ask a doctor to issue him a new prescription. Even though this request "was not the last possible act toward consummation of the crime"—since defendant would have to receive the prescription and present it to a pharmacist to receive the drugs—the court found this step sufficient to constitute an attempt. *Id.*

[19] *See also Hudson*, 745 So. 2d at 1001 (holding that defendant targeted by police sting using adult decoys was guilty of attempt to handle, fondle, or assault a child in a lewd, lascivious, or indecent manner where he made

In Florida, attempted burglary of a dwelling is a significantly less severe offense than burglary of a dwelling—one that can be imposed for conduct that does not approach the completed burglary, and one that Florida law treats as a less serious offense. This lesser offense does not involve conduct that necessarily presents a risk of physical injury to others, let alone a *serious* risk of such injury.

Furthermore, burglary is a property crime, and the elements of a completed burglary do not require the presence of other persons or a risk to other persons. Nevertheless, Congress included burglary as a violent felony because of its twin beliefs that burglary was often committed by "career criminals" and that a burglar's entry into a building could create a potential risk to persons within the building. See *Taylor*, 495 U.S. at 581.[20] The only "risk" presented by burglary, however, is the risk created when a burglar *enters* a building. "The fact that an offender enters a building to commit a crime ... creates the possibility of a violent confrontation between the offender and an occupant, caretaker, or some other person who comes to investigate." *Id.* at 588. In contrast, attempted burglary does not require

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travel arrangements for fictional child to visit him and approached taxi that he believed contained a child).

[20] The legislative history indicates that the potential risk of physical injury from completed burglaries was only one reason for including burglaries as ACCA predicates. Equally important was the fact that Congress believed that burglaries were often committed by career criminals. *See* H.R. Rep. No. 98-1073, at 3 (1984), *reprinted in* 1984 U.S.C.C.A.N. at 3663 ("'Most robberies and burglaries are committed by career criminals'"); *see also Taylor*, 495 U.S. at 582-86 (recounting 1986 testimony at hearing on ACCA revision that "'people ... make a full-time career and commit hundreds of burglaries'" and that "'your typical career criminal is most likely to be a burglar'" (omission in original)). The inclusion of burglary was also motivated by the belief that a burglar violates his victims' privacy and causes economic damage. H.R. Rep. No. 98-1073 at 3, *reprinted in* 1984 U.S.C.C.A.N. at 3663 ("'Burglaries involve invasion of [victims'] homes or workplaces, violation of their privacy, and loss of their most personal and valued possessions'").

any entry. In Florida, attempted burglary necessarily requires a finding that the defendant *failed* in his attempt to enter. Fla. Stat. § 777.04(1) (attempt requires proof that defendant "fail[ed] in the perpetration or [was] intercepted or prevented in the execution" of the attempted offense). Moreover, in Florida, a defendant could be convicted of attempted burglary without even attempting to enter a building. For example, a defendant could be convicted for merely casing a structure while planning a burglary, or for acting suspiciously in a frequently burglarized area.[21] A defendant who desisted in his planned burglary when he saw a security guard outside would similarly be liable.[22] Furthermore, given Florida's extension of burglary to the "curtilage," a defendant who failed in his efforts to open the fence surrounding an unoccupied structure could be guilty of attempted burglary. None of these overt acts would present the slightest risk of physical injury to another, let alone a "serious potential risk of physical injury." Indeed, Florida recognizes that attempted burglary is a "non-violent" offense. See *Ramsey* v. *State*, 562 So. 2d 394, 395 & n.2 (Fla. 5th Dist. Ct. App. 1991) (attempted burglary of a dwelling is a "non-violent third degree felony").

Even the more rigorous "substantial step" standard of the Model Penal Code would permit attempted burglary convictions for conduct that falls short of an attempt to enter. A "substantial step" under the Model Penal Code can be predicated on acts like "reconnoitering the place contemplated for the commission of the crime" or "posses-

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[21] *See, e.g., Smith*, 632 So. 2d at 646 (finding attempt to handle, fondle, or assault a child in a lewd, lascivious, or indecent manner where defendant's "act of repeatedly driving back by the girls can properly be viewed as a direct act" to support attempt conviction).

[22] *See, e.g., Webber*, 718 So. 2d at 259 (finding that a defendant was guilty of attempted dealing in stolen property where he set up deal to sell stolen credit cards, arrived at designated meeting place, and immediately left upon becoming suspicious).

sion . . . of materials to be employed in the commission of the crime, at or near the place contemplated for its commission." Model Penal Code § 5.01(2). Indeed, many reported cases affirm the sufficiency of attempted burglary convictions based on conduct that stops before the defendant attempted to enter. For example, attempted burglary convictions have stood where the only evidence was that the defendant was reconnoitering the property while possessing burglary tools.[23] Attempted burglary convictions likewise have been affirmed where the defendant fled the property before attempting to enter.[24] None of this conduct necessarily presents any risk of physical injury to another.

In each of these situations a defendant would have committed a sufficient overt act to create attempted burglary liability, but that overt act would create little or no risk of physical injury to others. These circumstances preclude any finding that attempted burglary convictions necessarily "involve[] conduct that presents a serious potential risk of physical injury to another." Attempted burglary convictions

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[23] *See, e.g.*, *People* v. *Jiles*, 845 N.E.2d 944, 955-57 (Ill. App. Ct. 2006) (affirming attempted burglary conviction where defendant was lurking on property with flashlight and burglary tools and finding it irrelevant that defendant "never attempted entry"); *Commonwealth* v. *Melnyczenko*, 619 A.2d 719, 720-21 (Pa. Super. Ct. 1992) (affirming attempted burglary conviction where defendant was walking through yards with burglary tools but "there was no indication that he attempted to break into any houses").

[24] *See, e.g.*, *Commonwealth* v. *Cannon*, 443 A.2d 322, 325-26 (Pa. Super. Ct. 1982) (affirming attempted burglary conviction where defendant broke through fence and then left scene after house light turned on, without attempting to enter house); *State* v. *Radi*, 542 P.2d 1206, 1208-09 (Mont. 1975) (affirming attempted burglary conviction where evidence showed that defendant left scene after attempting to open door); *Hines* v. *State*, 458 S.W.2d 666, 668 (Tex. Crim. App. 1970) (affirming attempted burglary conviction where defendant fled after light turned on without attempting to enter house).

in Florida do not inherently or necessarily involve conduct that presents such a risk.

C. The Eleventh Circuit's Decision And Other Decisions Holding That Attempted Burglary Is A Violent Felony Are Wrongly Decided.

The Eleventh Circuit's rationale for mechanically deeming any attempt to commit a predicate felony to be a predicate felony is thoroughly unconvincing. According to the Eleventh Circuit, "an inchoate crime qualifie[s] as a violent felony when its object involve[s] conduct that 'presented a serious potential risk of physical injury to another.'" JA 53 (alteration omitted). But § 924(e)(2)(B)(ii) does not apply to crimes the "object" of which would create a risk of physical injury—it only applies where the "conduct" required to prove the crime "presents a serious potential risk of physical injury to another." Under the Eleventh Circuit's rule, inchoate crimes like attempt and conspiracy are counted as predicate felonies regardless of whether the conduct required to prove those crimes ever presents a serious potential risk of physical injury. See *Wade*, 2006 WL 2195284, at *3-4; *Rainey*, 362 F.3d at 736 (holding attempted arson to be a violent felony); *United States* v. *Wilkerson*, 286 F.3d 1324, 1325 (11th Cir. 2002) (per curiam) (holding conspiracy to commit robbery to be a violent felony under § 924(e)(2)(B)(ii)). Indeed, the Eleventh Circuit's decision simply ignored Congress's deliberate choice to include attempts in § 924(e)(2)(B)(i) and exclude them from § 924(e)(2)(B)(ii).

Under the Eleventh Circuit's reasoning, a conspiracy to commit extortion would constitute a violent felony, even though such a conspiracy only requires proof of an "agreement" to commit the offense and an "intention" to commit the offense—not conduct that approaches the completed crime. *Corona* v. *State*, 814 So. 2d 1184, 1185 (Fla. 4th Dist. Ct. App. 2002) ("'The crime of conspiracy is comprised of the mere express or implied agreement of two or more persons to commit a criminal offense; both the

agreement and an intention to commit an offense are essential elements'") (quoting *Jimenez* v. *State*, 715 So. 2d 1038, 1040 (Fla. 3d Dist Ct. App. 1998)).[25] Likewise, an attempt to purchase explosives could be a violent felony—even if the "agreement" was made with a law enforcement officer and there was no actual prospect of completion. See, *e.g.*, *Fambo* v. *Smith*, 433 F. Supp. 590, 592-93 (W.D.N.Y.) (holding that defendant could have been convicted of attempted possession of explosives even though contents of tube of dynamite had been removed and replaced with sawdust), *aff'd*, 565 F.2d 233 (2d Cir. 1977).[26] This overinclusiveness is utterly at odds with the categorical approach of the ACCA.

The Eleventh Circuit's decision to treat all inchoate offenses as though they were completed crimes is an implicit acceptance of a position that other courts have taken explicitly--that *all* convictions for an inchoate offense will be treated as ACCA predicate felonies if "most" of the convictions will "involve[]" conduct that "'presents a serious potential risk of physical injury to another.'" *United States* v. *Custis*, 988 F.2d 1355, 1364 (4th Cir. 1993), *aff'd on other grounds*, 511 U.S. 485 (1994).[27] In *Custis*, the Fourth Circuit

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[25] The Florida standard jury instructions specifically provide: "It is not necessary that the defendant do any act in furtherance of the offense conspired." *See* Florida Standard Jury Instructions in Criminal Cases, 5.3. Criminal Conspiracy (4th ed. 2002).

[26] *See also Cunningham* v. *State*, 647 So. 2d 164, 166 (Fla. 1st Dist. Ct. App. 1994) (holding that defendant's negotiations with undercover officer were sufficient for conviction for attempted possession of marijuana); *Cohen*, 409 So. 2d at 64-65 (finding that defendant could be convicted for attempted cocaine trafficking even though the substance in question was not cocaine).

[27] The only question before this Court in *Custis* was whether a defendant in a sentencing proceeding could collaterally attack the validity of previous convictions that the prosecution sought to use to enhance his sentence under the ACCA. *See Custis* v. *United States*, 511 U.S. 485, 487 (1994). The Court was not presented with the question of whether an attempted burglary conviction could be an ACCA predicate.

held that attempted breaking and entering convictions should be treated as ACCA predicate felonies by reasoning that "[i]n most cases" the defendant would have been apprehended while in the process of entering a building. *Id.* Similarly, the Sixth Circuit has held that attempted burglary convictions ought to be counted if they "*generally* encompass[] conduct which creates a serious potential risk of injury to another person." *United States* v. *Bureau*, 52 F.3d 584, 592 (6th Cir. 1995) (emphasis added). A "possibility that [an] attempted burglary statute could encompass conduct which did not create a serious potential risk of injury to another person would not prevent us from finding that a conviction under the statute falls within the 'otherwise clause.'" *Id.* at 591; see also *United States* v. *Davis*, 16 F.3d 212, 217 (7th Cir. 1994) (holding that the residual clause will apply to crimes that create a "possibility of violent confrontation," regardless of whether "one can postulate a nonconfrontational hypothetical scenario").

Custis, *Bureau*, and *Davis* fundamentally misunderstand the categorical approach of the ACCA. If an offense could be an ACCA predicate act whenever "most" instances of the offense fell within § 924(e)(2)(B), *Taylor* would have been unnecessary. A court could similarly conclude that "most" burglary convictions are for burglary into buildings, not into automobiles, but that is not a valid reason for sentencing courts to treat convictions for non-generic burglary as ACCA predicate felonies on the ground that "most" of them are likely for generic burglary. On the contrary, the categorical approach precludes courts from using non-generic burglary convictions as ACCA predicates unless the charging documents and similar sources demonstrate that the particular conviction actually was for generic burglary.

Similarly, a nonenumerated offense can only be classified as an ACCA predicate if a conviction for that offense necessarily "involves conduct that presents a serious potential risk of physical injury to another." It is not enough to say that

a conviction will "generally" involve such conduct or that "most cases" will create such a risk. The categorical approach requires courts to find that all cases will present such a risk.

At bottom, the decisions of the Eleventh Circuit and the courts that agree with it are based on a policy judgment that attempted burglaries present similar risks as burglaries and ought to be treated the same way as burglaries. See *United States* v. *Payne*, 966 F.2d 4, 8 (1st Cir. 1992) ("So far as the risk of injury is concerned, we see little distinction between an attempted breaking and entering ... and a completed breaking and entering"). The idea that there is no distinction between the risk presented by completed burglaries and the risk presented by attempted burglaries is flatly wrong. An "overt act" in Florida requires much less than a completed entry and correspondingly creates much less risk. See *supra* pp. 20-28. Furthermore, unlike other states, Florida convictions for attempted burglary do not require near-completion, a substantial step, or dangerous proximity to completion. This Florida law is sharply distinguishable from the Massachusetts law construed by the First Circuit in *Payne*, the New York law construed by the Second Circuit in *Andrello*, and the Illinois law construed by the Seventh Circuit in *Davis*. Even the Eleventh Circuit has recognized that Florida law requires significantly less of an "act" to establish an attempt than other states. See *Wade*, 2006 WL 2195284, at *4.

Even if attempted burglary did present similar risks as completed burglary, it is Congress's language that controls—not what courts graft onto the statute as a logical extension. "[B]ecause of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity." *United States* v. *Bass*, 404

U.S. 336, 348 (1971).[28] Congress specifically chose not to include attempted burglary in § 924(e)(2)(B)(ii), and sentencing courts are bound to respect Congress's judgment—not reject it by reading attempted burglaries into the statute anyway.

D. The Doctrine Of Constitutional Avoidance Requires That The ACCA Be Interpreted To Prohibit Judicial Fact Finding.

"'[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.'" *Jones* v. *United States*, 526 U.S. 227, 239 (1999). Here, the Eleventh Circuit's establishment of a *per se* rule that all attempts to commit enumerated felonies are irrebutably presumed to "present[] a serious potential risk of physical injury to another" amounts to judicial fact finding of an essential element of the offense and therefore presents serious constitutional difficulties. *Taylor* rested in part on the doctrine of constitutional avoidance. Although the *Taylor* Court did not identify the doctrine by name, the Court articulated, among the reasons for its holding, the implications for a defendant's right to a jury trial if § 924(e)(2)(B)(ii) was interpreted to permit a "factual approach." 495 U.S. at 601. Thus, the Court held that the only plausible interpretation of § 924(e)(2)(B) is that it requires the sentencing court "to look only to the fact of conviction and the statutory definition of the prior offense." *Id.* at 602. In applying the doctrine of constitutional avoidance to interpret the ACCA as prohibiting findings of fact that operate to enhance a sentence significantly, the *Taylor* Court presaged this Court's later opinions in *Jones*,

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[28] *See also* Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 534 (1947) ("An omission at the time of enactment, whether careless or calculated, cannot be judicially supplied however much later wisdom may recommend the inclusion").

526 U.S. at 239-40, *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), and *Blakely* v. *Washington*, 542 U.S. 296 (2004).[29]

In *Jones*, for example, the Court construed a federal criminal statute to avoid Fifth and Sixth Amendment constitutional issues stemming from judge-made findings of fact that enhanced penalties beyond the statutory maximum. While both *Jones* and *Apprendi* note that "the fact of prior conviction" is excepted from prohibited factual findings, the justification for that exception is inapplicable here. The fact of a prior conviction is exempted from Fifth and Sixth Amendment procedural safeguards because they were in place during the course of those convictions. Here, however, the factual inquiry goes beyond the fact of conviction to establish that the underlying conduct "presents a serious potential risk of physical injury to another," a fact that is neither in the statutory elements of the offense, nor in the case law interpreting attempted burglary of a dwelling. Moreover, Florida case law directly refutes the notion that an attempted burglary of a dwelling presents such a risk—attempted burglary of a dwelling is expressly described as a non-violent offense. See *Ramsey*, 562 So. 2d at 395 & n.2.

In this case, the Eleventh Circuit conducted the judicial fact finding, and in the process, the court established a *per se* rule regarding attempted burglary convictions. In fact, the creation of the *per se* rule was the court's way of conducting the judicial fact finding—all attempts are irrebutably presumed to "present[] a serious potential risk of injury to another." The Eleventh Circuit's decision that § 924(e)(2)'s element of conduct "present[ing] a serious potential risk of injury to another" can be found based on the sentencing

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[29] In *Shepard*, the Court found that where a disputed fact, although described as a fact about a prior conviction, was "too far removed from the conclusive significance of a prior judicial record," and more akin to the findings subject to *Jones* and *Apprendi*, the Court was counseled "to limit the scope of judicial factfinding on the disputed character" of the prior conviction. *Shepard*, 544 U.S. at 25-26.

court's own assumption that attempted burglary convictions will often be predicated on facts that meet that element is unadulterated fact finding—and fact finding without foundation in anything but the court's speculations about the acts that underlie "most" convictions for attempted burglary. The Eleventh Circuit's *per se* rule therefore raises even more grave constitutional questions than this Court encountered in *Taylor* and *Shepard*. Indeed, *Jones*, *Apprendi*, and *Blakely* have removed any doubt that this sort of judicial fact finding is a constitutional violation. The Court should vacate Petitioner's conviction on this ground alone and reject the Eleventh Circuit's rule in order to prevent further constitutional violations.

1. Constitutional Avoidance in the Sentencing Context.

The precise constitutional problem to be avoided here is strikingly similar to the problem that influenced the Court's interpretation of the "carjacking statute" (18 U.S.C. § 2119) in *Jones* v. *United States*, 526 U.S. 227 (1999). That statute was interpreted as defining three different crimes rather than a single crime with two aggravating factors to be determined by the sentencing judge by a preponderance of the evidence. *Id.* at 251-52. There is no question here that § 924(e) elevates the penalty parameters as severely, or even more severely, than those at issue in *Jones*.[30] Like *Jones*, the issue here is whether the sentencing court may consider facts not adjudicated in the prior proceeding in order to impose sentence for the "aggravated" version of the crime. The constitutional principle discerned in *Jones* was "under the . . . jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury,

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[30] Petitioner's sentence increased from 71 months of imprisonment without the § 924(e) enhancement to 180 months of imprisonment with the enhancement. JA 37, 57.

and proven beyond a reasonable doubt." *Id.* at 243 n.6. In 1999, this principle had only been suggested by prior cases, but is now clearly established. *Apprendi*, 530 U.S. at 490; *Ring* v. *Arizona*, 536 U.S. 584, 603-09 (2002); *Blakely*, 542 U.S. at 303-04. Thus, the Court's level of constitutional concern here should rise above the level of doubt to near certainty.

In *Apprendi*, the Court held: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. In *Apprendi* and *Ring*, this Court concluded that the defendant's Sixth Amendment rights had been violated because the sentencing judge had "imposed a sentence greater than the maximum he could have imposed under state law without the challenged factual finding." *Blakely*, 542 U.S. at 303; see *Ring*, 536 U.S. at 603-09; *Apprendi*, 530 U.S. at 494-97. Similarly, in *Blakely*, the defendant's sentence was increased beyond the statutory maximum on the basis of findings of fact (that he had acted with "'deliberate cruelty'") by the sentencing judge that "were neither admitted by petitioner [in his guilty plea] nor found by a jury." 542 U.S. at 303. The Court held that the defendant's right to jury trial was violated because the judge acquired the authority to impose an enhanced sentence "only upon finding some additional fact." *Id.* at 305.

As *Apprendi* specifies, the fact of a prior conviction is an exception to this rule. This is because the certainty that the defendant received due process in the proceedings leading to the conviction ameliorates the concern that taking judicial notice of the fact of conviction violates a defendant's right to due process in a recidivist sentencing forum. 530 U.S. at 487-88; see also *Jones*, 526 U.S. at 249 ("[A] prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees.").

However, the confidence that the *Jones* Court had in the integrity of prior convictions is misplaced in situations where, as here, a subsequent court must engage in fact finding to resolve an ambiguity about the nature of the prior conviction.[31] Here, the application of § 924(e) turns on a *post hoc* adjudication which was not conducted in accordance with these guarantees. Whether Petitioner's attempted burglary of a dwelling conviction involved conduct presenting "a serious potential risk of physical injury to another" was not established beyond a reasonable doubt, nor admitted in the guilty plea as a fact or as an element. Nor was it likely that it would have been, as the Florida statutes involved do not require or even imply such a finding.[32]

A plain reading of the opinion in *Taylor* interdicts these constitutional concerns. Limiting *Taylor*'s reach to the fact of conviction as determined by a categorical approach cabins § 924(e) within the confines of the *Apprendi-Blakely* exception. *Shepard*, 544 U.S. at 24-26. *Taylor*'s categorical approach addresses and answers only questions of law (*e.g.*, whether the elements of the prior conviction encompass the elements of an enumerated offense or conduct under § 924(e)(2)(B)) and so does not infringe on the right to have

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[31] As noted in Justice Thomas' separate concurrence in *Apprendi*, even fact finding limited to prior conviction may itself raise the same grave and doubtful constitutional questions as fact finding in relation to other enhancements. *Apprendi*, 530 U.S. at 519-21.

[32] Although attempted burglary of dwelling in Florida does not require a finding that the conduct "presents a serious potential risk of physical injury to another," other statutes do require the jury to make such a finding. *See, e.g.*, Conn. Gen. Stat. § 53a-95 (providing that a person is guilty of unlawful restraint in the first degree – a Class D Felony – "when he restrains another person under circumstances which expose such other person to a *substantial risk of physical injury*") (emphasis added); Ind. Code § 35-42-2-2(b), (c)(2) (providing that a person is guilty of criminal recklessness – a Class D Felony – if the defendant intentionally performed an act that created a *substantial risk of physical injury to another person*) (emphasis added).

the jury assess all the facts that alter the congressionally proscribed range of penalties to which a criminal defendant is exposed. *Jones*, 526 U.S. at 253 (Scalia, J., concurring). In Petitioner's case, no jury has found that his attempted burglary of a dwelling conviction involved conduct presenting "a serious potential risk of physical injury to another."

2. The Eleventh Circuit's Interpretation of the ACCA Raises Grave Constitutional Questions.

The *per se* rule adopted by the Eleventh Circuit *requires* the sentencing court to, in essence, direct a verdict of the disputed fact, even though the disputed fact was not adjudicated in the prior proceeding. Although the Eleventh Circuit's *per se* rule avoids the kind of mini-trials discussed in *Taylor* and *Shepard*, the rule implicates additional constitutional concerns, such as the right to have a jury decide every material element of an offense. See *Gaudin*, 515 U.S. at 509-10.[33]

Petitioner did not contest the fact of his prior attempted burglary of a dwelling conviction. Petitioner did, nevertheless, contest that his prior conviction could serve as a predicate under the ACCA. The District Court expressed strong doubt "that the Florida attempt statute punishes only conduct with a severe potential risk of physical injury to another." JA 33. Nevertheless, the District Court considered itself bound by the Eleventh Circuit's ruling in *Rainey*, 362 F.3d at 735-36 (establishing a *per se* rule that an attempt to commit an enumerated felony (arson) under the ACCA constituted a violent felony). Relying on its decision in *Rainey*, the Eleventh Circuit reaffirmed its *per se* rule that an attempt to commit an enumerated felony (this time burglary)

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[33] Additionally, in *Gaudin*, the Court reiterated that deciding issues of fact, as well as mixed issues of law and fact, is a function constitutionally allocated to the jury. *Gaudin*, 515 U.S. at 513-15.

under the ACCA constitutes a violent felony. Indisputably, the court conducted judicial fact finding that went far beyond the fact of conviction.

To avoid the "grave and doubtful" Fifth and Sixth Amendment issues squarely presented by the Eleventh Circuit's *per se* rule, this Court must reaffirm its holding in *Taylor*. *Taylor*'s categorical approach allows the sentencing court to do no more than compare the statutory elements of conviction or the adjudicated elements of conviction to the elements of the sentence-enhancing clause and conclude whether they "substantially correspond." It permits no fact finding, nor should it allow a court to create a *per se* rule to direct a verdict against the defendant. With these restrictions, *Taylor*'s categorical approach involves only questions of law and avoids the grave and doubtful constitutional questions that the Court also avoided in *Jones* and the cases that followed it.

E. Under The Rule Of Lenity Any Doubt Must Be Resolved In Petitioner's Favor.

If there were any doubt about whether attempted burglary convictions were encompassed by § 924(e), the rule of lenity requires that it be resolved in favor of Petitioner. See *Bass*, 404 U.S. at 347 (stating that an ambiguity concerning the scope of criminal statutes should be resolved in favor of lenity). The rule of lenity is a manifestation of the bedrock principle that criminal statutes must provide "fair warning . . . in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear." *McBoyle* v. *United States*, 283 U.S. 25, 27 (1931) (Holmes, J.). "[T]he canon of strict construction of criminal statutes, or rule of lenity, ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered." *United States* v. *Lanier*, 520 U.S. 259, 266 (1997). Moreover, it is equally well settled that this rule applies not only to "the substantive ambit of criminal prohibitions, but

also to the penalties they impose." *Albernaz* v. *United States*, 450 U.S. 333, 342 (1981). Here, attempted burglary is not "clearly covered" by § 924(e)(2); indeed, every applicable canon of construction suggests that attempted burglaries are *not* to be included. Under the rule of lenity, § 924(e)(2) must be given its narrowest, most reasonable reading. That reading requires that Petitioner's attempted burglary conviction not be counted as a predicate act for sentencing purposes and that the Eleventh Circuit's judgment be reversed.

F. The Eleventh Circuit's Judgment Should Be Reversed For Flatly Ignoring *Taylor* And *Shepard*.

In addition, the Eleventh Circuit's opinion in this case should be vacated because it has failed to apply *Taylor*'s categorical analysis. Even assuming that attempted burglary convictions could be treated in the same way as burglary convictions, the Eleventh Circuit failed to determine whether Petitioner's attempted burglary conviction was imposed for attempted generic burglary or attempted non-generic burglary. Instead, the Eleventh Circuit simply assumed that Petitioner's conviction for "attempted burglary of a dwelling" was attempted generic burglary. This assumption was flatly wrong in light of Florida's unique definition of "dwelling," and the Eleventh Circuit's judgment should be reversed.

As discussed above, Florida's burglary statute is unique and far broader than that of any other state. The inclusion of "curtilage" within the statutory definitions of "structure" and "dwelling" means that a Florida conviction for burglary of a dwelling or structure could be based on such conduct as crossing a fence or passing a gate—conduct that is clearly not "generic burglary" under *Taylor*. But the Eleventh Circuit never addressed the elements of Florida's burglary statute or the issue of curtilage. Nor did the Court engage in any sort of *Taylor* analysis of the charging documents from the attempted burglary to determine whether the conviction was for attempted generic burglary or attempted non-generic burglary. Hence, there was no basis for the Eleventh Circuit

to conclude that Petitioner's attempted burglary conviction was actually a conviction for attempted generic burglary. This failure to apply *Taylor* and *Shepard* requires reversal.

CONCLUSION

For the foregoing reasons, the judgment of the Eleventh Circuit should be reversed.

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In the Supreme Court of the United States

ALPHONSO JAMES, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Whether petitioner's prior felony conviction for the Florida offense of attempted burglary of a dwelling qualifies as a "violent felony" under 18 U.S.C. 924(e) (2000 & Supp. II 2002).

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In the Supreme Court of the United States

No. 05-9264

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v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
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FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (J.A. 44-54) is reported at 430 F.3d 1150.

JURISDICTION

The judgment of the court of appeals was entered on November 17, 2005. The petition for a writ of certiorari was filed on February 14, 2006, and was granted on June 12, 2006. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are set out at Pet. Br. 2-4.

STATEMENT

Petitioner pleaded guilty in the United States District Court for the Middle District of Florida to one count of possessing a firearm after having been convicted of a felony, in violation of 18 U.S.C. 922(g)(1). He was sentenced to 71 months of imprisonment. The government appealed the sentence, and petitioner cross-appealed. The court of appeals vacated petitioner's sentence and remanded with instructions that the district court impose a sentence pursuant to the Armed Career Criminal Act of 1984 (ACCA), as amended, 18 U.S.C. 924(e) (2000 & Supp. II 2002). J.A. 45.

1. Congress enacted the ACCA in 1984 to assist the States in addressing the threat to public safety posed by career criminals. *Taylor* v. *United States*, 495 U.S. 575, 581 (1989). The law provided a 15-year mandatory minimum sentence for possession of a firearm by a felon who had three previous convictions for robbery or burglary. Pub. L. No. 98-473, Tit. II, §§ 1801-1803, 98 Stat. 2185 (codified at 18 U.S.C. App. 1202 (1982 & Supp. II 1984)). The crime of possession of a firearm by a convicted felon ordinarily carries a maximum term of imprisonment of 10 years. See 18 U.S.C. 924(a)(2). Congress chose robbery and burglary as the offenses that would trigger the sentence enhancement because "a 'large percentage' of crimes of theft and violence 'are committed by a very small percentage of repeat offenders,' and * * * robbery and burglary are the crimes most frequently committed by these career criminals." *Taylor*, 495 U.S. at 581 (quoting H.R. Rep. No. 1073, 98th Cong., 2d Sess. 1 (1984)). The statute defined "burglary" as a "felony consisting of entering or remaining surreptitiously within a building that is property of another with intent to en-

gage in conduct constituting a Federal or State offense." 18 U.S.C. App. 1202(c)(9) (Supp. II 1984).

Concerned about the limited reach of the law, Congress two years later "expanded the predicate offenses triggering the sentence enhancement," *Taylor*, 495 U.S. at 582, to promote "a greater sweep and more effective use of this important statute," *id.* at 583 (quoting 132 Cong. Rec. 7697 (1986)). In particular, Congress amended the ACCA by providing enhanced penalties for firearms offenders with three previous convictions "for a violent felony or a serious drug offense." Career Criminals Amendment Act of 1986, Pub. L. No. 99-570, § 1402(a), 100 Stat. 3207-39 (18 U.S.C. 924(e)(1) (1982 & Supp. IV 1986)). Congress defined the term "violent felony" to include any felony that:

> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

18 U.S.C. 924(e)(2)(B). "Congress singled out burglary (as opposed to other frequently committed property crimes such as larceny and auto theft) for inclusion as a predicate offense, both in 1984 and in 1986, because of its inherent potential for harm to persons." *Taylor*, 495 U.S. at 588.

In *Taylor*, this Court held that "any crime, regardless of its exact definition or label," is a generic "burglary" within the meaning of the ACCA if it "ha[s] the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to com-

mit a crime." 495 U.S. at 599. Recognizing that state statutes defined the offense of burglary differently, the Court adopted a "categorical approach" to determining whether a conviction under a state statute constitutes generic "burglary." Under that approach, the Court explained, sentencing courts "generally" should "look only to the fact of conviction and the statutory definition of the prior offense." *Id.* at 602.

Thus, if a state statute precisely corresponds with generic burglary or is narrower, a conviction under it necessarily qualifies as "burglary" for purposes of the ACCA. And if a state statute sweeps more broadly to cover some conduct that does not constitute generic burglary, such as a statute that proscribes unprivileged entry into a building or a vehicle, a sentencing court, under what some courts have characterized as a "modified" categorical approach, could consult "the charging paper and jury instructions" to determine whether the defendant was in fact convicted of generic burglary. *Taylor*, 495 U.S. at 602. The Court also pointed out that, regardless of whether a particular conviction was for "generic burglary," *id.* at 600, the government "remains free to argue that any offense—including offenses similar to generic burglary—should count towards enhancement as one that 'otherwise involves conduct that presents a serious potential risk of physical injury to another' under § 924(e)(2)(B)(ii)," *id.* at 600 n.9.

In *Shepard* v. *United States*, 544 U.S. 13 (2005), this Court applied *Taylor*'s modified categorical approach to a prior conviction based on a guilty plea and held that, in considering whether a burglary conviction under a non-generic state statute qualifies as an ACCA predicate, the sentencing court is limited to "the charging document, the terms of a plea agreement or transcript of

colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information." 544 U.S. at 26. Information in police reports or complaint applications that are not otherwise part of the charging instrument or the judicial proceedings may not be considered because that information is "too far removed from the conclusive significance of a prior judicial record." *Id.* at 25.

2. On January 31, 2003, in Fort Myers, Florida, police officers conducted a traffic stop of petitioner's vehicle. The officers smelled burning marijuana and conducted a search of the vehicle, in which they discovered a .380 caliber semi-automatic pistol and .380 caliber ammunition. 1/13/04 Tr. (Change of Plea) 15-16. On June 25, 2003, petitioner was charged with one count of possession of a firearm by a convicted felon, in violation of 18 U.S.C. 922(g)(1) and 18 U.S.C. 924(e) (2000 & Supp. II 2002). J.A. 14-15. The indictment listed three prior felony convictions: (1) Attempted Burglary of a Dwelling, in violation of Florida Statutes, Sections 810.02 and 777.04 (1993); (2) Possession of Cocaine, in violation of Florida Statutes, Section 893.13 (Supp. 1996), and Trafficking in Illegal Drugs, in violation of Florida Statutes, Section 893.135 (Supp. 1996); and (3) Trafficking in Cocaine, in violation of Florida Statutes, Section 893.135 (Supp. 1996). J.A. 14-15. On January 9, 2004, the United States filed a Notice of Penalties, Elements and Facts, reiterating that the government alleged that petitioner was an armed career criminal, listing petitioner's predicate violent felony and drug trafficking crimes, and indicating that petitioner was facing a "[m]andatory minimum term of imprisonment of fifteen years to life

without parole." Notice of Penalties, Elements and Facts 1.

Petitioner pleaded guilty to the federal felon-in-possession charge, based on his possession of a .380 caliber semi-automatic pistol and ammunition. At the Change of Plea hearing on January 13, 2004, the district court told petitioner that "in order for the Title 18, Section 924, Subsection (e) sentencing enhancement to apply, you must have three prior convictions for a violent felony or serious drug offense committed on occasions different from one another." 1/13/04 Tr. 12-13. The court read petitioner's prior felony convictions to him, including "attempted burglary of a dwelling in violation of Florida Statutes, Section 810.02 and 777.04, a crime punishable by imprisonment for a term exceeding one year, in the Circuit Court, Twentieth Judicial Circuit in and for Lee County, Florida, in the State of Florida versus Alphonso James, Case Number 94-2197-CF, on June the 3rd, 1997." 1/13/04 Tr. 14-15. After the court recited petitioner's prior felony convictions and the facts of his pending felon-in-possession charge, petitioner agreed that "all [of the listed prior convictions] occurred" (*id.* at 14), and he pleaded guilty. *Id.* at 18.

3. The probation office recommended that petitioner be sentenced as an armed career criminal under the ACCA based on the three prior convictions listed in the indictment. Gov't C.A. Br. 3; PSR para. 75. As relevant here, in 1994, petitioner pleaded nolo contendere in a Florida state court to one count of attempted burglary of a dwelling, which was occupied by a man and his 19-month-old daughter. After the man heard someone trying to open the door to his residence and went outside to investigate, petitioner threw a hammer through a closed window of the residence in order to gain entry. Adjudi-

cation of guilt was withheld, and the court placed petitioner on two years of probation. Petitioner was arrested for violation of that probation, however, had his probation revoked, and was adjudicated guilty in 1997 of the attempted burglary. PSR para. 29.

Petitioner objected "that his prior conviction * * * for Attempted Burglary of a Dwelling * * * should not be treated as a predicate offense" under the ACCA. Addendum to PSR 1. The Probation Office did not take a position on petitioner's objection but noted that if the district court were to agree, then petitioner would not qualify as an armed career criminal, and his sentencing range under the Guidelines would be 57 to 71 months. *Id.* at 2.

4. At sentencing on May 10, 2004, the district court asked petitioner's counsel whether petitioner had "any factual objections to the contents of the presentence report." 5/10/04 Tr. 3. Petitioner's counsel responded, "No, sir." *Ibid.* At the same time, counsel noted that petitioner did have a legal objection "that two of [petitioner's] prior convictions, * * * the attempted burglary and one of his drug cases," should not be counted "for purposes of making a determination of whether [petitioner is] an armed career offender." J.A. 21. With respect to the attempted burglary conviction, petitioner argued that "under Florida law an attempted burglary just does not present the same danger or degree of danger as presented by a burglary." J.A. 23.

Relying on the Eleventh Circuit's decision in *United States* v. *Rainey*, 362 F.3d 733 (per curiam), cert. denied, 541 U.S. 1081 (2004), which held that attempted arson under Florida law is a "violent felony" for purposes of the ACCA, the district court overruled petitioner's legal objection:

> The issue is whether the defendant's conviction for the attempted burglary of a dwelling constitutes a violent felony within the meaning of Section 924(e). It is clear that the Florida burglary statute does satisfy 924(e) when analyzed under the case of [*Taylor* v. *United States*, 495 U.S. 575 (1990)]; and there's been no argument to the contrary there. The only issue is whether an attempted burglary is a qualifying felony conviction.
>
> * * * * *
>
> It seems to me that the Eleventh Circuit [in *Rainey*] has essentially spoken; that if you have an attempt to commit an enumerated felony, that is a violent felony, so the Court is going to overrule the defendant's objection and the Court does hold that the attempted burglary of the occupied dwelling set forth in Paragraph 29 [of the PSR] is a qualifying offense under the armed reoffender statute.

J.A. 33-34.

The district court nevertheless did not sentence petitioner as an armed career criminal, because it concluded that one of petitioner's prior drug convictions did not qualify. Instead, the court imposed a sentence of 71 months of imprisonment, under the then-mandatory Guidelines. 5/10/04 Tr. 75-76; J.A. 45-46.

5. The government appealed from the non-ACCA sentence, and petitioner cross-appealed. The court of appeals vacated petitioner's sentence and ordered the district court to sentence petitioner "in accordance with the ACCA." J.A. 45. The court of appeals agreed with the government that the district court erred by not counting petitioner's 1997 Florida state drug trafficking

conviction as a "serious drug offense" under the ACCA. J.A. 47-52. And the court rejected petitioner's contention that attempted burglary of a dwelling under Florida law is not a "violent felony" under the ACCA. J.A. 52-54. The court relied on three of its precedents for the proposition that because burglary under Florida law is a "violent felony" within the meaning of 18 U.S.C. 924(e)(2)(B)(ii), it follows that attempted burglary under Florida law is also a "violent felony" under the ACCA. J.A. 53-54 (discussing *United States* v. *Wilkerson*, 286 F.3d 1324, 1325-1326 (11th Cir.) (per curiam) (conspiracy to commit robbery is a violent felony because the object of the conspiracy presents a serious potential risk of injury to another), cert. denied, 537 U.S. 892 (2002); *Rainey*, 362 F.3d at 735-736 (attempted arson, like arson, presents a serious potential risk of injury to another); *United States* v. *Gunn*, 369 F.3d 1229, 1238 (11th Cir.) (per curiam) (attempted burglary is a "crime of violence" under United States Sentencing Guidelines (Guidelines) § 4B1.1(a)(2) because "[a]n uncompleted burglary does not diminish the potential risk of physical injury"), cert. denied, 543 U.S. 937 (2004)).

Based on those precedents, the court of appeals rejected petitioner's argument that attempted burglary "merely poses 'a risk of a risk,'" holding instead that attempted burglary "like an attempt to commit arson, presents the potential risk of physical injury to another sufficient to satisfy the ACCA's definition of a 'violent felony.'" J.A. 54.

6. While petitioner's interlocutory petition for a writ of certiorari was pending in this Court, the case was remanded to the district court for resentencing. At the resentencing hearing on March 27, 2006, the district court denied petitioner's "renewed motion for a continu-

ance" pending this Court's action. 3/27/06 Tr. (Sent. on Remand) 7-8. Petitioner renewed his position "that the attempted burglary conviction is not a qualifying offense" under the ACCA. *Id.* at 10. Petitioner then advanced "an enlarged ground on the burglary offense," arguing for the first time that "it's not necessary [under Florida law] for one to actually enter into someone's property, or home" to be found guilty of burglary, *ibid.*, and that "the fact that the Florida law would make somebody guilty for attempting to enter into the curtilage or area around someone's home or property[] would further take the attempted burglary section out of the definition [of] generic burglary." *Id.* at 10-11. Petitioner's counsel indicated that when petitioner was originally sentenced in 2004, counsel was "not aware" of "the issue regarding curtilage and the deficiency in Florida's burglary statute." *Id.* at 15. The district court overruled petitioner's renewed objection and new objection, concluding again that "attempted burglary is, indeed, a qualifying offense" under the ACCA. *Id.* at 17.

The district court then "adopt[ed] the factual statements set forth in the pre-sentence report, as well as the application of the guidelines as originally set forth in the presentence report." 3/27/06 Tr. 20. As a result, the court determined that, under 18 U.S.C. 924(e) (2000 & Supp. IV 2002), petitioner faced a mandatory minimum sentence of 180 months of imprisonment. 3/27/06 Tr. 20; see PSR paras. 75-76.

7. Petitioner again appealed to the Eleventh Circuit. *United States* v. *James*, No. 06-12204. On June 26, 2006, the court of appeals granted petitioner's motion to stay the briefing schedule in that case pending this Court's decision on the writ of certiorari from the court of appeals' prior decision.

SUMMARY OF ARGUMENT

The court of appeals correctly determined that attempted burglary of a dwelling under Florida law is a violent felony under the ACCA because, like the completed offense of burglary, the attempt "presents the potential risk of physical injury to another sufficient to satisfy the ACCA's definition of a 'violent felony.'" J.A. 54. An attempt to commit a violent felony such as burglary necessarily presents a "serious potential risk of physical injury to another," 18 U.S.C. 924(e)(2)(B)(ii), because the attempt itself creates a serious potential for the risk of violence that inheres in a completed burglary offense. Indeed, States prohibit attempts generally, and attempted burglary in particular, in part because of the potential that a defendant may otherwise complete the crime, thus producing the harmful consequence that the criminal law aims to prevent.

Even examining only the conduct constituting the attempt, attempted burglary of a dwelling under Florida law qualifies as a "violent felony." In Florida, the conduct necessary to establish the attempt creates an immediate risk of harm that is comparable to that posed by a completed burglary. Under Florida law, a person must intend to commit burglary and must commit an overt act *directed towards entry of the dwelling* to be guilty of attempted burglary of a dwelling. See *Jones* v. *State*, 608 So. 2d 797 (Fla. 1992). Mere presence in a neighborhood with burglary tools is not enough. Anyone who attempts to enter a dwelling to commit a burglary, but fails or is otherwise prevented from doing so, thus presents a serious risk of physical injury to another that is akin to the risk presented by a completed entry.

Petitioner contends (Pet. Br. 17-20) that the plain language of the ACCA demonstrates that Congress intended to exclude attempt crimes from the definition of "violent felony." That is incorrect. When Congress expanded the definition of violent felonies in 1986, it established two categories of violent crimes, those requiring use of force against persons, see 18 U.S.C. 924(e)(2)(B)(i) (a crime that "has as an element the use, attempted use, or threatened use of force against the person of another"), and those that do not require the use of force against persons but "otherwise involve[] conduct that presents a serious potential risk of physical injury to another," 18 U.S.C. 924(e)(2)(B)(ii). Contrary to petitioner's contention, the reference to "attempted use" in the first definition does not trigger the inference that the expansive language in the "otherwise" clause of the second definition excludes attempts.

The canon of *ejusdem generis* is of no aid to petitioner. Petitioner contends (Pet. Br. 18-19) that burglary, arson, extortion, and the use of explosives—the four crimes or criminal conduct enumerated in Section 924(e)(2)(B)(ii)—are all completed offenses and thus the "otherwise" clause should be read to cover completed offenses only. But the criterion for inclusion as a violent felony under the "otherwise" clause is expressly specified in that clause, *viz.*, whether the crime "involves conduct that presents a serious potential risk of physical injury." Because the "otherwise" clause identifies the criterion that cabins its application, there is no need to resort to an interpretive canon as a means to import additional criteria into the statute.

Petitioner's contention (Pet. Br. 21-23) that Florida has departed from the generic burglary offense by defining a dwelling to include the enclosed space around

the dwelling (the curtilage) does not assist him, because the court of appeals rested its ruling on the "otherwise" clause, not on the ground that attempted burglary of a dwelling under Florida law is "generic" burglary. Moreover, the risk of violence presented by a breach or attempted breach of the enclosed curtilage is not categorically different from the risk presented by a breach or attempted breach of the dwelling itself.

Finally, petitioner's reliance on the canon of constitutional doubt and the rule of lenity is misplaced. Resolving whether a Florida attempted burglary offense is a "violent felony" requires purely legal determinations based on a comparison of the elements of attempted burglary with the definition of a violent felony under the ACCA. It does not even come close to constitutionally impermissible fact-finding about petitioner's prior conviction. And the rule of lenity is inapplicable because Section 924(e)(2)(B)(ii) is not ambiguous.

Even if this Court were to conclude that attempted burglary of a dwelling does not always present the requisite level of risk of injury, the crime surely does in many cases. Because petitioner has admitted (by virtue of his representation that he did not object to any facts in the PSR) that he threw a hammer through a window in a failed attempt to enter the dwelling, his prior conviction should qualify as a violent felony under whatever criteria this Court were to require under a modified categorical approach.

ARGUMENT

PETITIONER'S CONVICTION FOR ATTEMPTED BURGLARY OF A DWELLING UNDER FLORIDA LAW QUALIFIES AS A "VIOLENT FELONY" UNDER THE FEDERAL ARMED CAREER CRIMINAL ACT

Under the ACCA, a "violent felony" is defined as "any crime punishable by imprisonment for a term exceeding one year" that "has as an element the use, attempted use, or threatened use of physical force against the person of another" or "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(B). In *Taylor* v. *United States*, 495 U.S. 575 (1990), this Court held that the ACCA's reference to "burglary" includes "ordinary burglaries" (*id.* at 597)—namely, those that contain the elements of "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." *Id.* at 598. The Court explained that Congress sought to count such burglaries as violent felonies because "[t]he fact that an offender enters a building to commit a crime often creates the possibility of a violent confrontation between the offender and an occupant, caretaker, or some other person who comes to investigate." *Id.* at 588.

The court of appeals here correctly concluded that petitioner's prior conviction under Florida law for attempted burglary of a dwelling also counts as a "violent felony" under the ACCA's "otherwise" clause. The attempt, like the completed crime of burglary of a dwelling, "presents a serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(B)(ii). That is true for two basic reasons. First, all completed burglaries of a

dwelling pose a serious risk of physical injury, and all attempted burglaries therefore pose a "serious *potential* risk" of such injury. The attempt holds the potential of completing the crime; thus, it poses the risks inherent in that crime. Second, even if the "otherwise" clause focuses only on risks in the conduct constituting the attempt, Florida law defines attempted burglary in a manner that requires conduct posing a serious risk of physical injury—indeed, the same risk posed by the completed offense. On either theory, petitioner's conviction is a violent felony under the "otherwise" clause. Petitioner's arguments to the contrary, whether based on an interpretation of Florida law or on canons of statutory construction, are unpersuasive.

A. Attempts To Commit Violent Felonies Are Violent Felonies Under The ACCA Because They Necessarily "Involve Conduct That Presents A Serious Potential Risk Of Physical Injury To Another"

An attempt to commit a violent felony such as burglary falls within the "otherwise" clause because attempt crimes, by their very nature, create a "serious potential" for the risk of harm that the completed offense concretely presents. In *Taylor*, this Court explained that "Congress singled out burglary" in the ACCA "because of its inherent potential for harm to persons." 495 U.S. at 588. The Court further explained that the enumeration of "burglary" "seemingly was meant simply to make explicit the provision's implied coverage of crimes such as burglary" by virtue of the "otherwise" clause. *Id.* at 589. In *Leocal* v. *Ashcroft*, 543 U.S. 1, 10 (2004), this Court reiterated that burglary is a "classic example" of a "crime of violence" under 18 U.S.C. 16(b) because "burglary, by its nature, involves

a substantial risk that the burglar will use force against a victim in completing the crime."

Because there is a substantial or serious risk that a burglar will use physical force during a burglary, it follows that there is a "serious *potential* risk of physical injury to another" anytime someone *attempts* to commit a burglary. The perception that the attempt offense presents the potential for the harms that are associated with the completed offense is fundamental to the very rationale for punishing attempts. Indeed, "[O]ne important function served by the crime of attempt is to provide a basis whereby law enforcement officers may intervene in time to prevent a completed crime." Wayne R. LaFave & Austin W. Scott, Jr., *Criminal Law* § 6.2, at 498 (2d ed. 1986) (LaFave). The formulation Congress chose to define a "violent felony"—a crime that "involves conduct that presents a serious *potential* risk of physical injury to another"—indicates that consideration should be given not only to the risks present at the time the defendant acted, but also to those risks that were likely to materialize had the defendant accomplished his objective. See *The American Heritage Dictionary of the English Language* 1417 (3d ed. 1992) (defining "potential" to mean "Capable of being but not yet in existence").

The ACCA's formulation thus supports the court of appeals' conclusion that an *attempt* to commit a violent felony (such as burglary of a dwelling) that presents a serious risk of physical injury to another is a violent felony itself.[1] See J.A. 54; cf. *United States* v. *Wilkerson*,

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[1] Most jurisdictions today, including many federal courts, see *United States* v. *Joyce*, 693 F.2d 838, 841 (8th Cir. 1982), have adopted the Model Penal Code's approach to attempts. See LaFave § 6.2(d)(4), at 508. Under the Model Penal Code standard, "the requisite elements of

286 F.3d 1324, 1325 (11th Cir. 2002) ("[B]ecause robbery as defined by Florida law involves conduct that 'presents a serious potential risk of physical injury to another,' we conclude that a conspiracy that has as its object the offense of robbery likewise presents such a risk."), cert. denied, 537 U.S. 892 (2002).

The view that attempted violent felonies are violent felonies themselves is shared by the United States Sentencing Commission, which has construed the career offender enhancement, whose definition of "crime of violence" is virtually identical to the ACCA's definition of "violent felony," to apply to "the offenses of aiding and

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attempt are (1) an intent to engage in criminal conduct, and (2) conduct constituting a 'substantial step' towards the commission of the substantive offense which strongly corroborates the actor's criminal intent." *Joyce*, 693 F.2d at 841. See Model Penal Code § 5.01(1) (1962). As one court has explained, "[t]he problem faced by the drafters [of the Code] was that to punish as an attempt every act done to further a criminal purpose, no matter how remote from accomplishing harm, risks punishing individuals for their thoughts alone, before they have committed any act that is dangerous or harmful; yet, if the law punished only the very last act necessary to accomplish the criminal result, legal intervention would be delayed to a point at which it may well be too late to prevent harm." *United States* v. *Crowley*, 318 F.3d 401, 408 (2d Cir.), cert. denied, 540 U.S. 894 (2003). As explained in Part B, *infra*, Florida does not follow the Model Penal Code "substantial step" approach but specifically requires an overt act directed toward entry of the dwelling. Under either standard, an attempt to commit burglary presents a "serious potential risk of physical injury to another" because anytime a perpetrator who intends to commit burglary takes a substantial step towards commission of the offense, whether that step is directed toward entry (as Florida requires) or otherwise, there is a "serious potential" for completion of the burglary offense with its attendant risk of physical injury to another.

abetting, conspiring, and attempting to commit [crimes of violence]." Guidelines § 4B1.2(a), comment. (n.1).[2]

Congress's approach to attempt crimes similarly supports the court of appeals' decision. Congress has generally drawn no distinction between the completed crime and the attempt when setting the penalties for crimes. In the United States Code, the statutory punishment for a completed crime typically is identical to the punishment for an attempt.[3] The general rule that attempts

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[2] As then-Judge Breyer observed, "[t]he Commission, which collects detailed sentencing data on virtually every federal criminal case, is better able than any individual court to make an informed judgment about the relation between [a given crime] and the likelihood of accompanying violence." *United States* v. *Doe*, 960 F.2d 221, 225 (1st Cir. 1992). That expertise led the *Doe* court to "give some legal weight to the Commission's determination" that possession of a firearm by a convicted felon was not a "crime of violence" under the Guidelines for purposes of determining that it was likewise not a "violent felony" under the ACCA. *Ibid.* (citing *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944)). The Commission's view that an attempt to commit a crime of violence is itself a crime of violence supports the court of appeals' judgment that an attempted burglary of a dwelling should, under the "otherwise" clause, be treated the same as the completed offense for purposes of the ACCA.

[3] In many instances, attempt is treated as an alternative theory for conviction of the statutory crime. See, *e.g.*, 18 U.S.C. 33(a) (setting 20 years' imprisonment as statutory penalty for anyone who willfully destroys a motor vehicle or "willfully attempts to do [so]"); 18 U.S.C. 751(a) (setting same maximum penalty for "whoever escapes or attempts to escape from the custody of the Attorney General"); 18 U.S.C. 1031(a) (setting 10 years' imprisonment as statutory penalty for anyone who "knowingly executes, or attempts to execute" scheme to defraud the United States); 18 U.S.C. 1956(a)(3) (money laundering maximum penalty the same for "[w]hoever * * * conducts or attempts to conduct" specified transactions). In other instances, Congress has created an attempt offense distinct from the completed offense, but it has still chosen to subject that offense to the same penalties. See, *e.g.*,

and completed crimes are punished identically in the United States Code holds true for the few federal burglary or robbery crimes, where Congress has treated an attempt as an alternative theory for conviction of the statutory crime.[4] While Congress has not punished all attempts, its treatment of attempted burglary in particular settings as a crime equivalent to completed burglary (see 18 U.S.C. 2115, 2118(b)) reflects the notion that attempted burglary, like completed burglary, has the *potential* to produce serious violence.[5] Congress's

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21 U.S.C. 846 ("Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.").

[4] See 18 U.S.C. 2111 (robbery in maritime jurisdiction); 18 U.S.C. 2112 (robbery of United States property); 18 U.S.C. 2113-2115 (2000 & Supp. IV 2004) (bank or postal robbery or burglary); 18 U.S.C. 2118 (robberies and burglaries involving controlled substances); 18 U.S.C. 2119 (stealing motor vehicles with intent to cause death or serious harm); but see 18 U.S.C. 2117 (breaking or entering carrier facilities) (does not mention attempts); Indian Major Crimes Act, 18 U.S.C. 1153 (does not mention attempts)

[5] The prospect that an attempted burglary will produce serious violence is reflected in state codes. See, *e.g.*, N.Y. Penal Law § 125.25(3) (McKinney 1998) (person who commits or attempts to commit burglary and causes the death of another person in the course of the offense or of immediate flight therefrom is guilty of second-degree murder); Colo. Rev. Stat. § 18-3-102 (2005) (predicating first degree murder on the killing of a person during the commission of a burglary or attempted burglary or during immediate flight therefrom); Idaho Code § 18-4003(d) (2003) (first degree murder for murder committed in the perpetration or attempted perpetration of burglary); Tenn. Code Ann § 39-13-202(2) (2004) (first degree murder for killing another in the perpetration or attempt to perpetrate burglary); Conn. Gen. Stat. § 53a-54c (2003) (person guilty of murder who commits or attempts to commit burglary and causes death of another person in the course of the crime or of flight therefrom). Many cases also reflect the serious potential for

approach to attempted burglary indicates that the crime poses potential risks that are sufficiently serious to bring it within the "otherwise" clause.[6]

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violence that attempted burglary presents. See, *e.g.*, *State* v. *Gray*, No. 04AP-938, 2005 WL 2100595 (Ohio Ct. App. Sept. 1, 2005) (evidence established that the defendant fired two shots in rapid succession at an inhabited dwelling in response to inhabitants' verbal attempts to thwart attempted burglary); *Commonwealth* v. *Galindes*, 786 A.2d 1004 (Pa. Super. Ct. 2001) (the defendant fired shots after fleeing dwelling that he attempted to burglarize), appeal denied, 803 A.2d 733 (Pa. 2002) (Table); *People* v. *Simien*, 656 P.2d 698 (Colo. 1983) (attempted burglary of trailer prompted shoot-out that resulted in the deaths of a perpetrator and occupant).

[6] The Sentencing Guidelines envision that some attempts will not be punished as a completed crime. Section 2X1.1 provides that the calculation of the punishment for an attempt generally begins with the base offense level for the completed offense, "decrease[d] by 3 levels, unless the defendant completed all the acts the defendant believed necessary for successful completion of the substantive offense or the circumstances demonstrate that the defendant was about to complete all such acts but for apprehension or interruption by some similar event beyond the defendant's control." See § 2X1.1(b)(1). Section 2X1.1 does not apply, however, "[w]hen an attempt, solicitation, or conspiracy is expressly covered by another offense guideline section"; instead, that other Guideline section's more specific sentencing provision prevails. See § 2X1.1(c). In these other Guidelines sections, attempts are punished less severely for some crimes (*e.g.*, compare § 2A1.1 & § 2A1.2 (murder base offense level is 43 or 38), with § 2A2.1 (attempted murder base offense level is 33 or 27)), but are punished no differently for others (*e.g.*, § 2A3.1 (sexual abuse and attempted sexual abuse base offense level is 30)). The Guidelines section for burglary, § 2B2.1, does not provide for attempts, so attempted burglary would be punished according to § 2X1.1, *supra*.

B. Attempted Burglary Of A Dwelling Under Florida Law Is A Violent Felony Under The ACCA Because It Presents A "Serious Potential Risk Of Physical Injury To Another"

Even if this Court does not read the "otherwise" clause to permit consideration of the prospective risks that an attempt crime presents, petitioner's prior conviction for attempted burglary of a dwelling under Florida law still qualifies as a violent felony. Florida has defined attempted burglary in a way that requires conduct that creates an immediate and serious risk of physical injury to another.

1. Florida Law Requires An Act Directed Toward Entry Of The Dwelling

Under Florida law, "[a] person who attempts to commit an offense prohibited by law and in such attempt does any act toward the commission of such offense, but fails in the perpetration or is intercepted or prevented in the execution thereof, commits the offense of criminal attempt." Fla. Stat. § 777.04(1) (1993). At the time of petitioner's offense, Florida defined burglary as:

> entering or remaining in a structure or conveyance with the intent to commit an offense therein, unless the premises are at the time open to the public or the defendant is licensed or invited to enter or remain.

Fla. Stat. § 810.02(1) (1993).[7]

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[7] Florida further categorized burglaries into crimes of various degrees, classifying an armed burglary or a burglary that included an assault or battery as first degree burglary; a burglary of a dwelling or an occupied structure or conveyance as second degree burglary; and all other burglaries as third degree burglary. See Fla. Stat. § 810.02(2)-(4) -(1993). Florida defined "dwelling" as "a building or conveyance of any

In *Jones* v. *State*, 608 So. 2d 797 (1992), the Florida Supreme Court applied the general attempt provision to the crime of attempted burglary.[8] The defendant there contended that his convictions for possession of burglary tools and attempted burglary of a dwelling, arising from the same criminal episode, violated the double jeopardy prohibition. The court rejected the defendant's argument because, while each crime required proof of intent to commit burglary, "the overt act necessary to convict of the burglary tool crime is not the same as the overt act required to prove attempted burglary." *Id.* at 799. To illustrate the different requirements, the court discussed the facts of another case, *Thomas* v. *State*, 531 So. 2d 708 (Fla. 1988), where the court held that the crime of possession of burglary tools requires proof of "an overt act toward the commission of the burglary which goes beyond merely thinking or talking about it." *Jones*, 608 So. 2d at 798. In *Thomas*, the defendant had been arrested after jumping over a fence and trying to run away wearing a pair of socks over his hands and carrying a screwdriver. The defendant admitted that he had entered the neighborhood to commit a burglary. The *Jones* court observed that "based on these facts, it is obvious that [the defendant] could not have been convicted of attempted burglary because there had been no

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kind, either temporary or permanent, mobile or immobile, which has a roof over it and is designed to be occupied by people lodging therein at night, together with the curtilage thereof." *Id.* § 810.011(2).

[8] The Florida Supreme Court's construction of the attempt statute with respect to the crime of attempted burglary is authoritative. See, *e.g.*, *O'Brien* v. *Skinner*, 414 U.S. 524, 531 (1974) ("[I]t is not our function to construe a state statute contrary to the construction given it by the highest court of a State.").

overt act *directed toward entering or remaining in a structure or conveyance.*" *Id.* at 799 (emphasis added).

Thus, a defendant who is in possession of burglary tools and who intends to commit a burglary, but is caught before he engages in some act directed toward entering or remaining in a particular dwelling, cannot be convicted of attempted burglary in Florida. That requirement of an act directed toward entry is consistent with Florida's additional requirement in burglary cases that "the *nature and character* of the building allegedly burglarized * * * must be both alleged and proven with particularity." *Jackson* v. *State*, 259 So. 2d 739, 741 (Fla. Dist. Ct. App. 1972), aff'd as modified, 281 So. 2d 353 (Fla. 1973). It is likewise consistent with a Florida statute applicable solely to attempted burglary, which provides that "[i]n a trial on the charge of attempted burglary, proof of the attempt to enter such structure or conveyance at any time stealthily and without the consent of the owner or occupant thereof is prima facie evidence of *attempting to enter with intent to commit an offense.*" Fla. Stat. § 810.07(2) (2001) (emphasis added). See *Richardson* v. *State*, 922 So. 2d 331, 334 (Fla. Dist. Ct. App. 2006) (holding that evidence did not support jury instruction on attempted burglary because "[n]o version of the facts allowed for the conclusion that the perpetrator *had attempted entry* into the building and/or office and been foiled or interrupted") (emphasis added), review denied, No. SC06-717 (Fla. July 28, 2006); *Davis* v. *State*, 741 So. 2d 1213, 1214 (Fla. Dist. Ct. App. 1999) ("By pleading to attempted burglary, [the defendant] only admitted to *attempting to enter* with the intent to commit some offense once inside.") (emphasis added); *Davis* v. *State*, 730 So. 2d 837, 838 (Fla. Dist. Ct. App. 1999) ("unauthorized *attempted entry* into a con-

veyance" is an element of attempted burglary of a conveyance) (emphasis added).

Petitioner makes much of the apparent breadth of Florida's general attempt statute and cites numerous cases about attempted crimes other than attempted burglary. See Pet. Br. 23-28 & nn. 15-19. But he ignores the cases and the *prima facie* evidence statute discussed above that contrast attempted burglary with the crime of possession of burglary tools or otherwise specifically address the crime of attempted burglary and require conduct that brings the perpetrator to the threshold of the dwelling that he intends to burglarize. Indeed, petitioner does not cite a single case in which the Florida courts have upheld a conviction for attempted burglary of a dwelling in the absence of evidence that the defendant attempted to enter the dwelling. In fact, some cases hold even circumstantial evidence of an attempted entry insufficient to support a finding of attempted burglary. See, *e.g.*, *Nickell* v. *State*, 722 So. 2d 924, 925 (Fla. Dist. Ct. App. 1998) (holding that officer lacked probable cause to arrest the defendant for attempted burglary where the evidence—which consisted of a call to the police and a witness's statement that the defendant had broken the windows of an apartment complex laundry room with his head—"was equally consistent with a simple act of vandalism").

Thus, petitioner is incorrect in his assertion (Pet. Br. 21) that Florida has established a "low standard" for proving attempted burglary of a dwelling. And he is likewise incorrect in his assertion (Pet. Br. 27) that the Model Penal Code's "substantial step" standard is "more rigorous" than Florida's attempted burglary standard. Under the Model Penal Code's "substantial step" standard, conduct such as "reconnoitering the place contem-

plated for the commission of the crime" or "possession of materials to be employed in the commission of the crime, that are specially designed for such unlawful use or that can serve no lawful purpose of the actor under the circumstances" may not be ruled "insufficient as a matter of law" when "strongly corroborative of the actor's criminal purpose." Model Penal Code § 5.01(2). Because Florida law separately and expressly deals with the possession of burglary tools, and for attempted burglary requires an overt act directed toward entering the dwelling, it appears to require more than the Model Penal Code standard. Compare *Commonwealth* v. *Melnyczenko*, 619 A.2d 719, 721 (Pa. Super. Ct. 1992) (upholding attempted burglary conviction on the ground that "reconnoitering the area" while in possession of burglary tools was "substantial step"), appeal denied, 637 A.2d 288 (Pa. 1993) (Table), with *Jones*, *supra* (observing that defendant who was present in neighborhood and in possession of burglary tools that he intended to use to commit a burglary could not be convicted of attempted burglary in absence of overt act directed toward entry).

2. Attempted Burglary Of A Dwelling Under Florida Law Requires Conduct That Presents A Serious Risk Of Physical Injury To Another

Because Florida law requires an overt act directed toward entering the dwelling, the risk of physical injury presented by the crime of attempted burglary of a dwelling in Florida is virtually the same as the risk presented by a completed burglary. As the First Circuit has explained in holding that attempted breaking and entering under Massachusetts law is a violent felony under the "otherwise clause" of the ACCA, a violent encounter "is

just as likely to happen before the defendant succeeds in breaking in as after." *United States* v. *Payne*, 966 F.2d 4, 8 (1st Cir. 1992).[9] And even if the defendant is more apt to feel trapped and "to cause greater alarm to whomever he confronts" when the encounter occurs inside the dwelling, "the fact remains that there is a serious risk of confrontation while a perpetrator is attempting to enter the building" and that confrontation "is sufficiently likely to result in violence" to conclude that attempted burglary (or attempted breaking and entering) falls within the "otherwise" clause of Section 924(e)(2)(B)(ii). *Ibid.* Many other courts of appeals have similarly (and correctly) concluded that attempted burglary is a violent felony under the ACCA because the immediate risk of physical injury that it presents is comparable to that posed by a completed burglary.[10]

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[9] The court in *Payne* construed the Massachusetts statute as requiring conduct beyond "procuring burglary tools and setting out for certain premises" such as "coming on to the premises and being scared off or trying and being unable to break the lock." 966 F.2d at 9.

[10] See *United States* v. *Collins*, 150 F.3d 668, 670-671 (7th Cir.) ("Wisconsin's requirement that a defendant must attempt to enter a building before he can be found guilty of attempted burglary is sufficient to mandate that attempted burglary in Wisconsin constitutes a violent felony [under the "otherwise clause" of the ACCA]."), cert. denied, 525 U.S. 989 (1998); *United States* v. *Bureau*, 52 F.3d 584, 592-593 (6th Cir. 1995) (holding that attempted burglary under Tennessee law, a survey of which revealed that "a defendant convicted of this crime likely entered or nearly entered a building," is a violent felony under the ACCA because "the propensity for a violent confrontation and the serious potential risk of injury inherent in burglary is not diminished where the burglar is not successful in completing the crime"); *United States* v. *Davis*, 16 F.3d 212, 218 (7th Cir.) (observing that "there is little difference between the risk of confrontation in an attempted burglary and that in a completed burglary" where the law requires "dangerous proximity to success") (citation omitted), cert.

The decisions in which various courts of appeals have ruled that attempted burglary is not categorically a violent felony under the ACCA have involved state statutes that the federal court construed to permit conviction based on conduct that falls considerably short of an attempted entry. See *United States* v. *Weekley*, 24 F.3d 1125, 1127 (9th Cir. 1994) ("An attempt conviction would involve risky conduct where the statute requires, or the charging instruments and jury instructions show that the jury had to find, an entry or near-entry into a building. But an attempt conviction based on casing a home or merely possessing burglary tools would not.") (footnotes omitted); *United States* v. *Permenter*, 969 F.2d

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denied, 513 U.S. 945 (1994); *United States* v. *Andrello*, 9 F.3d 247, 249-250 (2d Cir. 1993) (per curiam) ("[S]ince burglary itself is a crime that inherently involves a risk of personal injury, the crime of attempted burglary under New York law, which requires proof of conduct that would present a serious potential risk of attainment, must be considered a crime that 'involves conduct that presents a serious potential risk of physical injury to another.'"), cert. denied, 510 U.S. 1137 (1994); *United States* v. *Thomas*, 2 F.3d 79, 80 (4th Cir. 1993) ("[T]he risk of confrontation, and physical harm, created when someone interrupts an intruder in the process of breaking in is nearly as great as the risk created when the interruption occurs after access is gained."); *United States* v. *O'Brien*, 972 F.2d 47, 52 (3d Cir. 1992) ("[T]he possibility of a violent confrontation with an innocent party is always present when a perpetrator attempts to enter a building illegally, even when the crime is not actually completed."), cert. denied, 510 U.S. 875 (1993); see also *United States* v. *DeMint*, 74 F.3d 876, 877-878 (8th Cir.) (per curiam) (attempted burglary under Florida law is violent felony under the ACCA), cert. denied, 519 U.S. 951 (1996); *United States* v. *Solomon*, 998 F.2d 587, 589-590 (8th Cir.) (same for Minnesota law), cert. denied, 510 U.S. 1026 (1993); *United States* v. *Fish*, 928 F.2d 185, 188 (6th Cir.) (Michigan law), cert. denied, 502 U.S. 834 (1991); *United States* v. *Lane*, 909 F.2d 895, 903 (6th Cir. 1990) (Ohio law), cert. denied, 498 U.S. 1093 (1991).

911, 914 (10th Cir. 1992) (observing that, under Oklahoma law, "a person can be convicted of attempted burglary * * * for conduct that does not involve contact or potential contact with another person"); *United States* v. *Strahl*, 958 F.2d 980, 986 (10th Cir. 1992) (under Utah law, "an attempted burglary conviction may be based upon conduct such as making a duplicate key, 'casing' the targeted building, obtaining floor plans of a structure, or possessing burglary tools"); *United States* v. *Martinez*, 954 F.2d 1050, 1054 & n.3 (5th Cir. 1992) (under Texas law, attempted burglary does not present same risk as completed burglary because "a defendant may be convicted of attempted burglary * * * without being in the vicinity of any building" and "could commit the crime in virtual solitude").

Regardless of whether those cases were correctly decided, but see Part A, *supra*; *United States* v. *Bureau*, 54 F.3d 584, 592 (6th Cir. 1995) (the decisions holding that attempted burglary is not a violent felony "overlook[] the word 'potential' in the 'otherwise' provision") (quoting *United States* v. *Kaplansky*, 42 F.3d 320, 323 (6th Cir. 1994) (en banc)), the requirement that the defendant commit an overt act directed toward entering the dwelling ensures that the conduct involved in an attempted burglary of dwelling under Florida law categorically will present a "serious potential risk of physical injury to another." Anytime someone who intends to commit a burglary goes so far as to engage in conduct directed towards entering a dwelling, there is a serious risk that a violent encounter will occur. While it is possible that, in cases where the burglary is frustrated by the presence of another, the perpetrator will simply run away, and while it is possible that the burglary may simply fail because the perpetrator is unable to get inside

the dwelling, those possibilities do not negate the existence, *ex ante*, of a serious risk that the perpetrator's conduct in seeking entry to commit a burglary will provoke violence. The prospect of injury in those circumstances is far from remote. See *United States* v. *Mathews*, 453 F.3d 830, 837 (7th Cir. 2006) ("[I]n postulating a hypothetically non-violent scenario, [the defendant] misunderstands the basic inquiry under subsection (e)(2)(B)(ii)'s 'otherwise' clause. By speaking of 'serious *potential risk*,' * * * the statute deals in probabilities of injury, not certainties."); *United States* v. *Thomas*, 361 F.3d 653, 659 (D.C. Cir. 2004) ("A 'risk,' of course, is merely 'the possibility' of loss or injury. * * * And while the addition of the adjective 'serious' would seem to increase the required degree of probability, the interjection of the second adjective, 'potential,' appears to reduce it again.") (quoting *Merriam Webster's Collegiate Dictionary* 912, 1011 (10th ed. 1996)), vacated on other grounds, 543 U.S. 1111 (2005); see also *Kaplansky*, 42 F.3d at 325.

Indeed, the same possibilities of non-violence can easily be hypothesized for completed burglary yet it is expressly covered by the statute. For example, the burglar may (and often goes out of his way to) commit the offense when no one is home.[11] Despite the reality that many burglaries will in fact be committed without any violent confrontation, Congress determined that burglary met the criteria for a violent felony and should be categorized as such. As this Court explained in *Taylor*, when Congress expanded the ACCA in 1986, it chose to

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[11] As a practical matter, completed burglaries will often be completed precisely because the dwelling is unoccupied, whereas attempted burglaries will often remain attempts because the presence of another individual frustrated the burglary. See note 5, *supra*.

include as qualifying offenses not only crimes that required the use of force against persons but also crimes against property such as burglary that pose a serious danger to others. See 495 U.S. at 587-589. While Congress left it to the courts to determine what other crimes besides those enumerated similarly present a "serious potential risk of physical injury to another," 18 U.S.C. 924(e)(2)(B)(ii), the crimes that Congress identified as meeting that standard provide paradigms for purposes of identifying those other offenses. See *Thomas*, 361 F.3d at 659 (reasoning that the enumerated offenses under the career offender enhancement provision of the Sentencing Guidelines (whose language is virtually identical to the ACCA) can properly serve as a benchmark against which the risk presented by another offense may be measured to determine whether it qualifies). And because the crime of attempted burglary of a dwelling under Florida law does not "carr[y] appreciably less risk of injury" (*id.* at 660) than does burglary, it falls within the "otherwise" clause.[12]

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[12] Petitioner suggests that it is anomalous to categorize attempted burglary of a dwelling as a violent felony, because Florida does not categorize it as such. See Pet. Br. 27. But the question here is whether attempted burglary of a dwelling is a violent felony *under federal law*, so the manner in which the crime is categorized by the State is irrelevant. See, *e.g.*, *United States* v. *Walker*, 442 F.3d 787, 788 (2d Cir. 2006) (per curiam) (deeming New York's classification of offense as non-violent felony irrelevant for purposes of determining whether offense is "violent felony" under the ACCA). For the reasons discussed in Part A, *supra*, there is nothing anomalous in concluding that attempted burglary triggers the same sentencing consequence as burglary for *federal* sentence enhancement purposes. Moreover, as petitioner points out (Pet. Br. 16), the maximum sentence in Florida for attempted burglary of a dwelling is five years, and the ACCA requires

C. The ACCA's Plain Language Does Not Exclude Attempts

Petitioner argues (Pet. Br. 17-20) that, even if attempted burglary of a dwelling "involves conduct that presents a serious potential risk of physical injury to another," 18 U.S.C. 924(e)(2)(B)(ii), it cannot be counted as a violent felony because the plain language of Section 924(e)(2)(B) reflects Congress's intent to exclude attempts from subsection (e)(2)(B)(ii). That claim lacks merit.

1. The Expressio Unius Canon Does Not Apply

Petitioner first invokes the cannon of *expressio unius est exclusio alterius*, contending that the inclusion of the word "attempt" in subsection (e)(2)(B)(i) but not in subsection (e)(2)(B)(ii) demonstrates a deliberate choice by Congress to exclude attempt crimes from the "otherwise" clause in subsection (ii). That canon, however, "does not apply to every statutory listing or grouping; it has force only when the items expressed are members of an 'associated group or series' justifying the inference that items not mentioned were excluded by deliberate choice." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003) (quoting *United States* v. *Vonn*, 535 U.S. 55, 65 (2002)); see *Ford* v. *United States*, 273 U.S. 593, 611-612 (1927). Here, had "violent felony" been defined to mean "arson, attempted arson, extortion, attempted extortion, or burglary," there might be a role for the cannon to play in supporting the conclusion that Congress intended to omit attempted burglary. But that is not what the statute provides. Subsection (e)(2)(B)(i)

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only that the crime be "punishable by imprisonment for a term exceeding one year." 18 U.S.C. 924(e)(2)(B).

sets out one criterion—crimes that have "as an element the use, attempted use, or threatened use of physical force against" persons—that Congress used to identify violent felonies. Subsection (e)(2)(B)(ii) sets out a second, alternative criterion: crimes involving conduct that presents a serious potential risk of physical injury to another. Subsection (e)(2)(B)(ii) also sets out four examples of crimes or conduct—burglary, arson, extortion, and the use of explosives—that meet that criterion. See *Taylor*, 495 U.S. at 589. Congress's formulation of the second criterion—"involves conduct that presents a serious potential risk of physical injury"—is an expansive one that indicates that Congress sought to include *any* crime, be it an attempt, conspiracy, or completed offense, that carries the requisite level of risk of injury. See *Davis*, 16 F.3d at 217 (deeming "untenable" the contention that Congress would have expressly referenced attempt crimes in subsection (e)(2)(B)(ii) had it desired to include them "in light of the very existence of the 'otherwise' clause, which Congress plainly included to serve as a catch-all provision").[13]

That expansive language plainly does not imply, much less establish, that Congress sought to exclude crimes on the basis of some criterion (such as their inchoate nature) other than the one identified. See *United States* v. *King*, 325 F.3d 110, 112-114 (2d Cir.) (rejecting similar argument that because the definition of "serious drug offense" does not reference attempts, and the definition of "violent felony" (in Section 924(e)(2)(B)(i))

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[13] Subsection (e)(2)(B)(i), by contrast, does not include a similar catch-all clause. It would be particularly inappropriate to draw an inference from one section expressly including attempt, but not featuring a catch-all clause, that the catch-all clause in the second section excluded attempt.

does, Congress intended to exclude attempted drug offenses), cert. denied, 540 U.S. 920 (2003); see also *United States* v. *Winbush*, 407 F.3d 703, 705-708 (4th Cir. 2005) (adopting *King*); cf. *Chevron U.S.A. Inc.*, v. *Echazabal*, 536 U.S. 73, 80 (2002) ("[T]he expansive phrasing of [the provision] points directly away from the sort of exclusive specification [the respondent] claims.").

2. The Ejusdem Generis Canon Does Not Aid Petitioner

Petitioner's invocation of the "maxim of *ejusdem generis*" (Pet. Br. 18-19) to exclude attempts from the "otherwise" clause is equally unavailing. Petitioner contends (Pet. Br. 19) that the "common attribute" of the crimes and conduct that precede the "otherwise" clause in Subsection (e)(2)(B)(ii) is "completion" such that the "otherwise" clause should be read to apply to completed offenses only.[14] But the "otherwise" clause itself identifies the "common attribute" that is relevant to Subsection (e)(2)(B)(ii), namely, whether the prior offense "involves conduct that presents a serious potential risk of physical injury to another." Cf. *Harrison* v. *PPG Indus., Inc.*, 446 U.S. 578, 588-589 (1980) (rejecting ap-

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[14] Apart from the problems discussed in the text, the premise of petitioner's argument—that the crimes listed share the attribute of completion—is incorrect. An attempt could undoubtedly "involve[] use of explosives." See, *e.g.*, 18 U.S.C. 844(i) (making it a crime to "maliciously damage[] or destroy[], or attempt[] to damage or destroy, by means of fire or an explosive, any building, vehicle, [etc.]"). Another problem with petitioner's reading of the statute is that it would exclude numerous attempt crimes, such as those set out in Section 844(i), that undoubtedly present a "serious potential risk of physical injury to another." This Court will not interpret a statute to produce an absurd result, especially where the plain language, structure, purpose, and history of the provision do not support that interpretation. See *Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982).

plication of *ejusdem generis* because "we discern no uncertainty in the meaning of the phrase, 'any other final action,'" and because "[t]his expansive language offers no indication whatever that Congress intended the limiting construction * * * that the respondents now urge"); *Gooch* v. *United States*, 297 U.S. 124, 128 (1936) (rejecting *ejusdem generis* where its application would "require rejection of that sense of the words which best harmonizes with the context and the end in view"). The crimes and conduct expressly enumerated are examples of offenses that meet that criterion and were listed out of an abundance of caution to make clear that those examples met the standard. See *Taylor*, 495 U.S. at 589. If anything, the canon of *ejusdem generis* supports the government's position, because attempted burglary is very similar to burglary in the most relevant respect, the risk of injury to innocent persons that it presents. See *Thomas*, 361 F.3d at 659-660 (invoking *ejusdem generis* canon in concluding that the crime of escape is a crime of violence because it does not "carr[y] appreciably less risk of injury to another than do the listed crimes").

3. The Legislative History Does Not Support Petitioner's Reading Of The Text To Exclude Attempts

Petitioner contends (Pet. Br. 19-20) that Congress's failure in 1984 to enact a Senate bill that would have included attempted burglaries and conspiracies supports reading the current version of the ACCA to exclude attempts. That claim too lacks merit. If the ACCA had not been amended in 1986 and still defined "violent felony" to mean only "robbery or burglary" petitioner would have a point. But the law was amended in 1986 to "'expand[]' the range of predicate offenses." *Taylor*, 495

U.S. at 584 (citing *Armed Career Criminal Legislation: Hearing on H.R. 4639 and H.R. 4768 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 99th Cong., 2d Sess. (1986)).

The bills seeking to amend the ACCA replaced the 1984 law's reference to "robbery or burglary, or both" with two broad classes of predicate offenses, "serious drug offenses" and "violent felonies" or "crimes of violence." One bill, H.R. 4768, § 2(b), 99th Cong., 2d Sess. (1986), defined "violent felony" to mean only "any State or Federal felony that has as an element the use, attempted use, or threatened use of physical force against the person of another." Another bill, H.R. 4885, § 2(b), 99th Cong., 2d Sess. (1986), included that same definition of violent felony but defined "violent felony" also to include offenses that "involve[] conduct that presents a serious potential risk of physical injury to another." The Report accompanying H.R. 4885 explained that the purpose of the latter definition was to "add State and Federal crimes against property such as burglary, arson, extortion, use of explosives and similar crimes as predicate offenses where the conduct involved presents a serious risk of injury to a person." *Taylor*, 495 U.S. at 587 (quoting H.R. Rep. No. 849, 99th Cong., 2d Sess. 3 (1986)). As the Court explained in *Taylor*, the bill that ultimately became law, H.R. 5484, amended H.R. 4885 by adding the phrase "*is burglary, arson, or extortion, involves use of explosives, or otherwise* involves conduct that presents a serious potential risk of physical injury to another." *Id.* at 587 (quoting 18 U.S.C. 924(e)(2)(B)(ii)).

What the legislative history demonstrates is that Congress sought broadly to expand the category of violent felonies by including crimes targeting persons for

physical harm and by including crimes that do not specifically target persons for physical harm but nevertheless by their nature present a serious potential risk that a person will be injured. There is no indication in the legislative history that Congress chose a *broad* formulation for injury-risking offenses in order to achieve the counterintuitive purpose of *excluding* attempt crimes. Instead, Congress chose "uniform, categorical definitions to capture all offenses of a certain level of seriousness that involve violence or an inherent risk thereof, and that are likely to be committed by career offenders, regardless of technical definitions and labels under state law." *Taylor*, 495 U.S. at 590.

D. Florida's Treatment Of Curtilage Does Not Take Attempted Burglary Of A Dwelling Outside The Otherwise Clause

Petitioner contends (Pet. Br. 23) that attempted burglary under Florida law does not categorically present "a serious potential risk of physical injury to another" on the ground that Florida's burglary statute is "non-generic." He points out that the statute "criminalizes the entry of 'conveyance[s]'" and "expands the definition of burglary to include not only buildings, but also the grounds around the buildings." *Id.* at 21 (quoting *State* v. *Hamilton*, 660 So. 2d 1038, 1041 (Fla. 1995)).[15] Petitioner's claim lacks merit.

[15] In evaluating whether petitioner's prior attempted burglary conviction presented a serious potential risk of injury to another, this Court may take as a given that his conviction was for attempted burglary of a dwelling, because petitioner admitted that fact at his change of plea hearing. See 1/13/04 Tr. 12-16; Pet. Br. 38 (conceding that "[p]etitioner did not contest the fact of his prior attempted burglary of a dwelling conviction"); *United States* v. *Wade*, 453 F.3d 1273, 1278 n.1 (11th Cir. 2006) (observing that the *James* decision

1. To begin with, the court of appeals did not rest its conclusion that petitioner's attempted burglary conviction is a "violent felony" on the ground that Florida's burglary statute satisfies *Taylor*'s definition of generic burglary. To the contrary, the court of appeals held that attempted burglary is a violent felony because it "otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(B)(ii). See J.A. 54 ("[A]n attempt to commit burglary * * * presents the potential risk of physical injury to another sufficient to satisfy the ACCA's defini-

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"covers convictions for attempted burglary of a dwelling, not any other crime"). Furthermore, petitioner did not object to the PSR's factual account of the offense, which identified the targeted property as an occupied residence. See 5/10/04 Tr. 3; *United States* v. *Harris*, 447 F.3d 1300, 1306 (10th Cir. 2006) ("[The defendant's] failure to object to the PSR created a factual basis for the court to enhance his sentence under the ACCA."); *United States* v. *Shelton*, 400 F.3d 1325, 1330 (11th Cir. 2005) (holding that a defendant "admit[s] the facts in the PS[R]" when he does not dispute them); but see *United States* v. *McCall*, 439 F.3d 967, 974 (8th Cir. 2006) (en banc) (remanding case for further proceedings where PSR indicated that it was relying on sources not approved by *Taylor* or *Shepard*, even though the defendant did not object to the "PSR recitals"); *United States v. Corona-Sanchez*, 291 F.3d 1201, 1212 (9th Cir. 2002) (en banc) (sentencing court may not rely upon a PSR's recitation of the underlying facts of the crime resulting in the prior conviction, even if uncontested, at least where the "information contained in [the] presentence report [does not itself come] from an identified, acceptable source [that] can constitute evidence under *Taylor*'s modified categorical approach"). Petitioner's attempt to inject Florida's treatment of curtilage into this case after the decision was rendered below could similarly be rejected on the ground that he affirmed that he was not objecting to any facts in the PSR, including the fact that his attempted burglary involved an attempted entry into the residence itself. See PSR para. 29.

tion of 'violent felony.'").[16] The prem-ise of petitioner's argument—that non-generic burglary does not "present a serious potential risk of physical injury"—finds no support in *Taylor*. The *Taylor* Court nowhere suggested, much less held, that a non-generic burglary offense could not satisfy the "otherwise" clause. To the contrary, the Court stated that "[t]he Government remains free to argue that any offense— including offenses similar to generic burglary—should count towards enhancement as one that 'otherwise involves conduct that presents a serious potential risk of physical injury to another' under § 924(e)(2)(B)(ii)." 495 U.S. at 600 n.9.

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[16] Petitioner contends (Pet. Br. 14 n.6) that the basis for the court of appeals' decision is unclear and that its more recent decision in *Wade*, *supra*, appears to have held that attempted burglary of a dwelling is encompassed within the reference to generic "burglary" in Section 924(e)(2)(B)(ii) such that it is unnecessary to determine whether attempted burglary satisfies the ACCA's "otherwise" clause. The rationale for the Eleventh Circuit's decisions is clear, however. Both the decision below and *Wade* relied on *United States* v. *Rainey*, 362 F.3d 733, 736 (11th Cir.) (per curiam), cert. denied, 541 U.S. 1081 (2004) which held that attempted arson is a "violent felony" under the ACCA. The court there expressly held that "[b]ecause attempted arson presents a serious potential risk of injury to another person, * * * the district court correctly concluded that it is a violent felony under § 924(e)." *Ibid.* The decision below also relied on *Wilkerson*, 286 F.3d at 1325, which held that conspiracy to commit robbery presents a serious potential risk of physical injury because the object of the conspiracy itself "presents such a risk." The Eleventh Circuit's holdings that an attempt to commit an enumerated offense such as burglary or arson is a violent felony thus do not rest on the notion that the enumeration of the generic offense includes the attempt offense, but rather on the notion that the risks inherent in the completed offense inhere in the attempt to a sufficient degree to justify treating the attempt to commit the violent felony as a violent felony itself under the "otherwise" clause.

2. Florida's treatment of curtilage does not undercut the court of appeals' conclusion that attempted burglary of a dwelling under Florida law categorically presents a serious potential risk of injury to another. "The curtilage concept originated at common law to extend to the area immediately surrounding a dwelling house the same protection under the law of burglary as was afforded the house itself." *United States* v. *Dunn*, 480 U.S. 294, 300 (1987). Under Florida law, a dwelling, the burglary of which is a second degree felony, see note 7, *supra*, is defined to include its curtilage. See Fla. Stat. § 810.011(2) (1993). As the Florida Supreme Court has explained, "in England a person's house with its cluster of outbuildings was usually enclosed by a wall or fence, and this enclosed area was referred to as the curtilage." *Hamilton*, 660 So. 2d at 1042. At common law, "[b]uildings not used for habitation (such as barns, stables, and other outhouses) might still be the subject of burglary if they were part of the * * * curtilage of the mansion house." LaFave § 8.13(c), at 796 (citing 4 William Blackstone, *Commentaries* * 225). Florida's modern burglary statute departed from the common law by making a breach of the curtilage itself (as opposed to the structures located within it) a violation of the burglary statutes. See *id.* at 796-797 ("The curtilage originally signified a fenced-in area, * * * but the breaking of the curtilage itself was not an offense."); *Hamilton*, 660 So. 2d at 1041 ("Florida's present burglary statute expands the definition of burglary to include not only buildings, but also the grounds around the buildings.").

In *Hamilton*, the Florida Supreme Court held that, for purposes of Florida's burglary statute, "some form of an enclosure [is required] in order for the area surrounding a residence to be considered part of the

'curtilage' as referred to in the burglary statute." 660 So. 2d at 1044; *id.* at 1043 (citing with approval jury instruction that defines curtilage to mean "the enclosed grounds immediately surrounding the building"). The court proceeded to invalidate a burglary conviction that was predicated on the defendant's entry into the backyard of a home that "was not enclosed in any manner other than 'several unevenly spaced trees.'" *Id.* at 1046.

Even assuming *arguendo* that Florida's treatment of curtilage would take its burglary statute outside *Taylor*'s definition of generic burglary,[17] it is clear that burglary of a dwelling under Florida law categorically "involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(B)(ii). The *Hamilton* case limited the scope of curtilage to an enclosed space surrounding the dwelling. See *Baker* v. *State*, 636 So. 2d 1342, 1344 (Fla. 1994) (stating that the curtilage "is an integral part of the structure or dwelling that it surrounds"); *Martinez* v. *State*, 700 So. 2d 142, 143-144 (Fla. Dist. Ct. App. 1997) (holding that an unattached garage is not part of the dwelling's curtilage because property was not enclosed). A resident is apt to protect that enclosed space proximate to the dwelling in the same manner that he would protect the dwelling itself or another structure located within the enclosed space. That is presumably why it is enclosed. A resident who goes to the trouble of enclosing his property has manifested an expectation that the area enclosed will be private, and the resident will defend that expectation accordingly.

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[17] *Taylor* did not address the concept of curtilage. But see *United States* v. *Pluta*, 144 F.3d 968, 975-976 (6th Cir.) (Florida's burglary statute is non-generic because it includes burglaries of conveyances and the curtilage), cert. denied, 525 U.S. 916 (1998).

The protection that the Fourth Amendment accords the curtilage reflects that understanding. As this Court has observed, "[t]he [Fourth Amendment] protection afforded the curtilage is essentially a protection of families and personal privacy in an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened." *California* v. *Ciraolo*, 476 U.S. 207, 212-213 (1986).[18] Given the "heightened" expectation of privacy that a resident of a dwelling would possess with respect to his curtilage, and because the curtilage under Florida law must be proximate to the dwelling and enclosed, the Court's observations in *Taylor* and *Leocal* about the likelihood of a confrontation between the burglar and a resident and the concomitant threat of physical injury that burglary poses are no less applicable to the dwelling's curtilage than to the dwelling itself.[19]

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[18] This Court applies a four-factor test in determining whether a given area is properly characterized as curtilage for Fourth Amendment purposes. See *Dunn*, 480 U.S. at 301 ("[W]e believe that curtilage questions should be resolved with particular reference to four factors: the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by."). Thus, Florida's definition of curtilage for purposes of its burglary statute is narrower than this Court's Fourth Amendment conception of curtilage to the extent that the *Dunn* test would permit a finding that a non-enclosed area is curtilage subject to Fourth Amendment protection. See, *e.g.*, *Widgren* v. *Maple Grove Township*, 429 F.3d 575, 582 (6th Cir. 2005) (finding yard to be curtilage because, among other reasons, "although the area was not within an enclosure, a clear line marked the mowed portion from the surrounding area that had not been cleared").

[19] For all of his emphasis on curtilage, petitioner cites no cases in which the Florida courts have upheld an attempted burglary conviction

E. Neither The Doctrine Of Constitutional Avoidance Nor The Rule Of Lenity Applies

Petitioner's resort to the doctrine of constitutional avoidance (Pet. Br. 33-39) is unfounded. Petitioner suggests that covering attempted burglaries implicates the concerns about judicial fact-finding voiced in *Jones* v. *United States*, 526 U.S. 227 (1999), and *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000). But those cases concern fact-finding about the defendant's conduct on matters particular to his case. The court of appeals did not engage in any such fact-finding in this case, much less fact-finding that would raise constitutional concerns. To the contrary, the court made the quintessential legal determination that attempted burglary of a dwelling under Florida law "involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(B)(ii). That determination involves the application of the language of Section 924(e)(2)(B)(ii) to the elements of attempted burglary and the concomitant judgment that the risk of harm presented by the conduct required to establish those elements meets the ACCA's threshold "level of seriousness" (*Taylor*, 495 U.S. at 590). That legal exercise is the province of the court, not the jury. Indeed, that determination does not require *any* assessment of the facts specific to petitioner's prior conviction. In fact, petitioner's argument ultimately reflects nothing more than a disagreement with the court of appeals' conclusion about the threat attempted burglary of a dwelling presents. But Congress by enacting the "otherwise" clause expressly left it to the courts to make precisely that determination.

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based on an attempted entry into the land surrounding a dwelling as opposed to the dwelling itself.

Nor does the rule of lenity (Pet. Br. 39-40) assist petitioner. That rule requires a "grievous ambiguity" in statutory text such that, "after seizing everything from which aid can be derived, we can make no more than a guess as to what Congress intended." *Muscarello* v. *United States*, 524 U.S. 125, 138-139 (1998) (internal quotation marks and citations omitted and punctuation altered). Petitioner, however, does not identify any particular language in the statute that he claims is ambiguous. Instead, his argument here (Pet. Br. 40) again appears simply to reflect a disagreement with the court of appeals' conclusion that attempted burglary of a dwelling presents a "serious potential risk" of injury. Congress chose a formulation, "serious potential risk of physical injury," 18 U.S.C. 924(e)(2)(B)(ii), that requires courts to make commonsense judgments based on everyday experience and cases that come before them, and provided four examples of crimes or conduct that satisfy the standard it established. Courts are fully capable of deciding whether a given crime presents a risk of harm that is closely related or comparable to that presented by the enumerated offenses. For the reasons discussed in Parts A & B, there is no doubt that petitioner's prior offense is a "violent felony" under the ACCA.

F. Petitioner's Conviction Satisfies The ACCA Under A Modified Categorical Approach

Even if this Court were to conclude that attempted burglary of a dwelling under Florida law does not categorically present a "serious potential risk of physical injury to another," 18 U.S.C. 924(e)(2)(B)(ii), on the theory that the crime encompasses some conduct that does not present that risk, it should permit courts to apply the *Taylor* methodology to determine whether the at-

tempted burglary at issue satisfies the statutory criterion. In *Taylor*, this Court held that it was permissible for sentencing courts to go beyond the mere fact of conviction in burglary cases where a statute swept more broadly than the generic definition of burglary. 495 U.S. at 599-602. In particular, the Court ruled that a sentencing court could consult the "charging paper and jury instructions" to determine whether the defendant was in fact convicted of generic burglary. *Id.* at 602. In *Shepard* v. *United States*, 544 U.S. 13 (2005), this Court ruled that a similar inquiry could be conducted for guilty-plea based convictions, permitting a court to review "the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record" in deciding whether a defendant who was convicted under an overly broad statute "necessarily admitted elements of the generic offense." *Id.* at 26.

A parallel inquiry could be undertaken in this context to determine whether a conviction under an attempted burglary statute that does not categorically satisfy the "otherwise" clause nevertheless qualifies because the defendant "necessarily admitted elements" of an attempted burglary offense that does satisfy the "otherwise" clause.[20] Whatever standard for attempted bur-

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[20] Although this Court has recognized that the modified categorical approach adopted in *Taylor* "covered other predicate ACCA offenses," *Shepard*, 544 U.S. at 17 n.2, the federal courts of appeals are divided on whether a modified categorical approach may be undertaken with respect to the "otherwise" clause. Compare, *e.g.*, *McCall*, 439 F.3d at 973 (permitting resort to sources approved in *Taylor* and *Shepard* to determine whether the defendant's prior drunk driving conviction fell

glary of a dwelling this Court might adopt, petitioner's attempted burglary offense, which involved his throwing a hammer through the window of the dwelling he attempted to burglarize, surely would meet it. Petitioner's attempted physical entry into the dwelling unquestionably presented a "serious potential risk of physical injury to another."

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under the "otherwise" clause where the statute under which he was convicted was "overinclusive * * * because it criminalizes non-driving conduct that does not necessarily present a serious risk of physical injury to others"), with *Permenter*, 969 F.2d at 914 (rejecting application of modified categorical approach to the "otherwise" clause). See also *United States* v. *Piccolo*, 441 F.3d 1084, 1088 n.7 (9th Cir. 2006) ("Although we have previously left open the question whether the modified categorical approach applies to cases arising under the 'catchall' provision, we see no reason why it would not apply to that provision.") (citations omitted); *Weekley*, 24 F.3d at 1127 & n.3 (concluding that attempted burglary under Washington law does not categorically satisfy the "otherwise" clause and further observing that while an attempt conviction would satisfy the "otherwise" clause if the "statute requires, or the charging instruments and jury instructions show that the jury had to find, an entry or near-entry into a building" "there is nothing in the charging instruments or plea agreement indicating that [defendant's] conduct entailed entry or near-entry").

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

ALPHONSO JAMES, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

Respondent's brief in support of the Eleventh Circuit's holding that *all* attempted burglaries qualify as "violent felonies" for purposes of the imposition of a minimum 15-year mandatory sentence under the Armed Career Criminal Act ("ACCA") suggests that this Court adopt a rule that is breathtaking in its scope. The logical conclusion of Respondent's argument is that all prior felonies could become violent felonies under the "otherwise" clause of 18 U.S.C. § 924(e)(2)(B)(ii) where a sentencing court determines, based solely upon its "commonsense" and "experience," that such a felony presents a serious potential risk of injury to another. Resp. Br. 43. Such a radical expansion of the scope of the ACCA is wholly contrary to the language of the statute, its structure and its history. It is also wholly contrary to the Court's unequivocal and repeated prescriptions for interpreting the ACCA in both *Shepard* v. *United States*, 544 U.S. 13 (2005) and *Taylor* v. *United States*, 495 U.S. 575 (1990). And further, it is contrary even to the arguments that Respondent previously offered to this Court in successful support of its position in *Taylor*. Accordingly, Respondent's suggested rule must be rejected.

There is nothing crabbed or narrow about the competing rule offered by Petitioner. The ACCA's language and structure is logical and specific. Section 924(e)(2)(B)(i) encompasses, expressly, any prior felony that "has as an *element* the ... attempted use, or threatened use of physical force against the person of another." *Id.* (emphasis added). The following subsection, § 924(e)(2)(B)(ii), also specifies certain completed "property" crimes, including burglary, but nowhere specifies that attempts or threats against such property are included. The last clause of that subsection ("or otherwise involves conduct that presents a serious potential risk of physical injury to another") is properly read, per the maxims of statutory construction and *Taylor* and *Shepard*, to encompass a broad range of property crimes that nonetheless

have as an *element* the endangerment of others. On this reading, the ACCA is broad in scope, yet true to its language, origins and this Court's holdings.

Respondent's proposed interpretation of the "otherwise" clause does violence to the integrity of the statute and would have sentencing courts legislate the elements of ACCA convictions. The consequences of Respondent's suggested rule is that sentencing courts may find any felony to be an ACCA predicate based on nothing more than a subjective judgment that such crimes tend to pose a risk of physical injury. Because the only limiting principle Respondent offers is the "common[ ]sense" and "experience" of well-meaning jurists, Respondent's position unavoidably would result in irreconcilable interpretations of the risk inherent in certain crimes. To invite such an interpretive patchwork is especially inappropriate where the stakes are so terribly high—here, the ACCA's minimum 15-year mandatory sentence.

I. RESPONDENT'S INTERPRETATION OF THE ACCA VIOLATES BASIC RULES OF STATUTORY CONSTRUCTION.

Respondent has now abandoned its argument before the Eleventh Circuit that an attempted burglary is an enumerated "burglary" under § 924(e)(2)(B)(ii). See Reply Br. of Cross-Appellee United States 16-19 (arguing that term "burglary" includes attempted burglaries). The only remaining question, therefore, is whether attempted burglaries fall within the "otherwise" clause of § 924(e)(2)(B)(ii) as crimes that "involv[e] conduct that presents a serious potential risk of physical injury to another." As Petitioner explained in his opening brief, the "otherwise" clause must be interpreted within the context of the surrounding statute, which strongly indicates that § 924(e)(2)(B)(ii) was not intended to encompass attempt crimes. Respondent, on the other hand, claims that the "otherwise" clause is a broad mandate for courts to use their "common[ ]sense" to identify which crimes they believe are sufficiently risky—indeed, Respondent

contends that the other crimes defined in § 924(e)(2)(B)(ii) are nothing but superfluous examples. Resp. Br. 43. Respondent's interpretation is at odds with Congress' language and the legislative history, creates grave constitutional doubt, and—even if correct—would not justify a conclusion that a Florida conviction for attempted burglary "involves conduct that presents a serious potential risk of physical injury to another."

A. Congress Intentionally Omitted Attempt Crimes From § 924(e)(2)(B)(ii).

Respondent simply has no effective answer to the most relevant statutory evidence of whether Congress intended § 924(e)(2)(B)(ii) to encompass attempt crimes: the fact that Congress explicitly *provided for* attempt crimes in § 924(e)(2)(B)(i) and explicitly *omitted* attempt crimes in § 924(e)(2)(B)(ii). The stark contrast between these sequential clauses is the clearest possible indication that Congress did not intend § 924(e)(2)(B)(ii) to include attempt offenses. "'[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (alteration in original); see Pet. Br. 18 (citing *Russello*).

Respondent offers no reason why a *Russello* presumption should not apply here (indeed, its brief does not even bother to cite *Russello*). Instead, Respondent pretends that Petitioner "invoke[d] the cannon [sic] of *expressio unius est exclusio alterius*," and directs its argument at that straw man. Resp. Br. 31. Respondent misstates Petitioner's argument, which never relied on the *expressio unius* presumption that arises when an "associated group or series" omits an element that would ordinarily be listed, but instead on the presumption that Congress' decision to include language in one part of an Act and omit it in another indicates a conscious omission.

Compare *Chevron, U.S.A., Inc.* v. *Echazabal*, 536 U.S. 73, 81 (2002), with *Russello*, 464 U.S. at 23. In arguing that *expressio unius* ought not to apply, Respondent heavily relies on the fact that subsections (i) and (ii) set forth different "criteria" for crimes to constitute violent felonies. Resp. Br. 32. But that is precisely the point. Congress established two criteria for "violent felonies" and "'include[d] particular language'" in § 924(e)(2)(B)(i) while omitting it *in the very next clause*. *Russello*, 464 U.S. at 23. This direct juxtaposition creates a powerful presumption that Congress' omission was intentional.

Curiously, Respondent claims that its interpretation is supported by the fact that Congress often specifies that attempts and completed crimes should be punished similarly. See Resp. Br. 18-19 (arguing that there is a "general rule that attempts and completed crimes are punished identically in the United States Code"). It is certainly true that, when Congress intends to punish attempted crimes, it does so explicitly. See, *e.g.*, 18 U.S.C. §§ 33(a), 1031(a), 2118. But, as Respondent itself acknowledges, Congress does not always treat attempts and completed crimes the same; in several statutes it specifies different punishments for attempted and completed offenses. See, *e.g.*, § 1201(a), (d) (punishing attempted kidnapping less severely then completed kidnapping). In others it has chosen to punish only the completed offense. See, *e.g.*, § 2117. The only "general rule" that can be derived from this disparate treatment of attempts is the rule that Congress treats attempts differently in different statutes and the only way to divine Congress' intent is to apply the words it uses. Here, where Congress explicitly included "the attempted use of force" in § 924(e)(2)(B)(i) and failed to include similar "attempt" language in § 924(e)(2)(B)(ii), Congress has indicated clearly that attempt offenses were not to be encompassed in § 924(e)(2)(B)(ii).

B. Respondent's Interpretation Of § 924(e)(2)(B)(ii) Is Untenable.

In Respondent's view, the "otherwise" clause of § 924(e)(2)(B)(ii) controls the entire subsection. The four specific crimes enumerated in § 924(e)(2)(B)(ii) are deemed to be nothing more than "examples" of the "expansive" last clause of the statute. Resp. Br. 32. This tortured interpretation of Congress' language is wrong for several reasons. First, it would make each of these supposed "examples" superfluous—"a result [this Court] eschew[s] in statutory interpretation." *Jackson* v. *Birmingham Bd. of Educ.*, 544 U.S. 167, 190 (2005). Moreover, Respondent ignores the fundamental principle that, where specific terms precede a general term in a statute, those specific terms limit the reach of that general term, and are not to be treated as mere "examples." See *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 114-15 (2001). To reason, as Respondent does, that specific statutory terms should be treated as subordinate examples to the general term that they precede would turn this Court's *ejusdem generis* jurisprudence on its head. See, *e.g.*, *id.* (applying *ejusdem generis* to interpret general provisions in light of preceding specific terms, and not vice versa); *Garcia* v. *United States*, 469 U.S. 70, 71 (1984) (same); *Garner* v. *Louisiana*, 368 U.S. 157, 167-68 (1961) (same).[1] If

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[1] As Petitioner argued in its initial brief, because § 924(e)(2)(B)(ii) only enumerates completed offenses, *ejusdem generis* dictates that the "otherwise" clause encompass only completed offenses. Pet. Br. 18-19. Respondent does not contest that the "burglary," "arson," and "extortion" referred to in § 924(e)(2)(B)(ii) are completed offenses, but instead hypothesizes that an attempt crime could involve the "use of explosives." Resp. Br. 33 n.14. But Congress' use of the term "use of explosives" (and not "attempted use of explosives") coupled with § 924(e)(2)(B)(i)'s explicit inclusion of attempt crimes definitively establishes that Congress intended the term to reach only completed offenses. *See Russello*, 464 U.S. at 23. Moreover, the fact that one could be convicted under 18 U.S.C. § 844(i) for attempting to destroy property by means of explosives in no way indicates that such an attempt necessarily would involve the

Congress truly had intended for § 924(e)(2)(B)(ii) to be a broad category illuminated by specific examples, it would have drafted the statute that way: *e.g.*, "The term 'violent felony' means crimes involving conduct that presents a serious potential risk of physical injury to another, including but not limited to burglary, arson, extortion, and crimes involving the use of explosives." Congress' decision instead to adopt a framework that this Court has long held to "limit[] general terms which follow specific ones to matters similar to those specified" demonstrates that it did not intend the final clause of § 924(e)(2)(B)(ii) to have such an expansive meaning. *Gooch* v. *United States*, 297 U.S. 124, 128 (1936).

C. The Legislative History Of The ACCA Further Shows That § 924(E)(2)(B)(Ii) Does Not Encompass Attempt Crimes.

If any more support were needed to supplement the overwhelming textual evidence that attempted burglaries are not encompassed by § 924(e)(2)(B)(ii), the legislative history provides it. When Congress enacted the ACCA in 1984 it rejected language that would have made attempted burglary an ACCA predicate. See Pet. Br. 19-20. Respondent appears to concede that the 1984 version of the ACCA would not have encompassed attempted crimes, see Resp. Br. 34, but claims that the 1984 legislative history is irrelevant because when Congress reenacted the ACCA in 1986 "it sought broadly to expand the category of violent felonies" and therefore could not have meant to "exclud[e] attempt crimes." *Id.* at 35-36 (emphasis omitted). First, Respondent misunderstands Congress' intent in 1986. While Congress did not hesitate to "expand" the ACCA to cover serious drug offenses and the inherently violent predicate offenses encompassed by § 924(e)(2)(B)(i), it balked at similarly expansive language for property crimes, specifically language

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"use of explosives." One can imagine many scenarios in which an individual took a substantial step or made an overt act sufficient to establish a criminal attempt without "using" any explosives.

that would expand the definition of violent felonies to reach all felonies that "'involve[] a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.'" *Taylor*, 495 U.S. at 583 (quoting H.R. No. 99-4639 (1986)). This language "was seen as too broad," and Congress instead chose to adopt the current, narrower definition. *Id.* at 586. More importantly, in expanding the number of predicate offenses, Congress never abandoned the element-based approach it adopted in 1984. *Id.* at 590 ("Nor is there any indication that Congress ever abandoned its general approach, in designating predicate offenses, of using *uniform, categorical definitions* to capture all offenses of a certain level of seriousness that involve violence or an inherent risk thereof ....") (emphasis added).[2] And the United States does not point to a shred of legislative history evidence that the 1986 amendments were intended to reach attempted property crimes.[3] In short, Congress' decision to add to the list of offenses that categorically qualify as ACCA predicates in no way signifies an intent that the fundamental canons of *Russello* and *Circuit City* should be abandoned when construing § 924(e)(2)(B)(ii).

D. Post-ACCA Constructions Of Other Sentencing Provisions Are Irrelevant.

Respondent heavily relies on the United States Sentencing Commission's construction of the career offender enhancement, but this is of no moment to the meaning of the

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[2] Respondent has recognized (correctly) that the 1986 version of the ACCA "was designed to preserve the status quo from the 1984 Act with respect to the offense of burglary." Brief of United States, *Taylor* v. *United States*, 495 U.S. 575 (filed Dec. 29, 1989), *available at* 1989 WL 1126976, at *27.

[3] *Cf.* Brief of United States, *Taylor*, 1989 WL 1126976, at *32 ("It is highly unlikely that Congress would have endorsed such a radical change in its approach to the enhancement provisions of the Armed Career Criminal Act without leaving any evidence whatsoever of its intention to do so").

ACCA. Resp. Br. 17-18. The Sentencing Commission made it very clear that its interpretation of the career offender sentencing enhancement provision was not an interpretation of the ACCA. See USSG § 4B1.4 cmt. n.1 ("The term[] 'violent felony' [is] defined in 18 U.S.C. § 924(e)(2). It is to be noted that the definition[] of 'violent felony' ... [is] not identical to the definition[] of 'crime of violence' ... used in § 4B1.1 (Career Offender)").[4] Furthermore, the Sentencing Guidelines themselves were not effective until November 1987—*after* the ACCA was passed in its current form. *Id.* § 4B1.2. The Sentencing Commission's interpretation of the career offender enhancement to include attempts dates from November 1989. USSG app. C amend. 268. These post-ACCA interpretations of a different sentencing provision are completely irrelevant as to what Congress intended in 1986 when it enacted the current version of the ACCA. See *Franklin* v. *Gwinnett County Pub. Schs.*, 503 U.S. 60, 61 (1992). Moreover, the Sentencing Commission has the discretion to use policy judgments when it interprets Guidelines. See USSG § 1A1.1; see also 18 U.S.C. § 994 (describing the policy factors weighed by the Sentencing Commission in designing the Guidelines). Courts construing criminal statutes do not have such discretion—they must apply the statute that Congress wrote and cannot extend it "simply because a court may think this a good idea."[5]

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[4] Designation as a career offender for sentencing has considerably less serious practical consequences than being convicted as an armed career criminal under the ACCA. While an ACCA conviction increases both the mandatory minimum and statutory maximum sentences, career offender status alters neither. And while an ACCA conviction carries a mandatory minimum sentence of 15 years in prison, a career offender designation can result in an enhanced sentence of as little as 30 months, depending on the nature of the underlying offense. *See* USSG § 4B1.1(b-c).

[5] Respondent's reliance on *United States* v. *Doe*, 960 F.2d 221, 222 (1st Cir. 1992), is unavailing. *Doe* cited Sentencing Commission commentary as but one of several rationales supporting its interpretation of the ACCA—first and foremost of which was its conclusion that the plain

Willheim v. *Murchison*, 342 F.2d 33, 42 (2d Cir. 1965) (Friendly, J.).

II. RESPONDENT'S INTERPRETATION OF THE ACCA IS ILLOGICAL AND LEADS TO ABSURD RESULTS.

Even accepting the Respondent's argument that the "otherwise" clause of § 924(e)(2)(B)(ii) could encompass attempted crimes, Resp. Br. 42, attempted burglaries under Florida law are not crimes that create a "serious potential risk of physical injury to another." According to Respondent's logic, all attempted burglaries are violent felonies because "all completed burglaries of a dwelling pose a serious risk of physical injury, and all attempted burglaries therefore pose a 'serious *potential* risk' of such injury." Resp. Br. 14-15.[6] Neither premise is correct.

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language of § 924(e)(2)(B) did not cover convictions for felony possession of a firearm. *Id.* at 225. Nothing in *Doe* suggests that Sentencing Commission commentary is a license to ignore the statute's language.

[6] Respondent's selective emphasis of the word "potential"—and not the word "serious"—is telling. Congress' use of the modifier "serious" demonstrates that the "risk" envisioned by the "otherwise" clause must be a substantial one. *See Webster's Third International Dictionary* 2073 (1993) (defining "serious" as "weighty, difficult," "important, significant," and "such as to cause considerable distress, anxiety, or inconvenience: attended with danger"). It is not enough to hypothesize that physical injury might possibly result from an offense—instead, the offense must necessarily involve a serious potential for such injury. And, Respondent's attempt to read "serious" out of the statute by claiming that its effect is somehow negated by the adjective "potential" is meritless. Arguing that these two terms cancel each out violates the fundamental rule that "a statute ought ... to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001) (internal quotation marks omitted). This is particularly so because there is a much more reasonable alternative reading of the statute—that both "serious" and "potential" underscore the fact that the "risk" discussed in § 924(e)(2)(B)(ii) must be a concrete one. *See Webster's Third International Dictionary* 1775

First, Respondent's current position that "all completed burglaries of a dwelling pose a serious risk of physical injury" is squarely inconsistent with its previous interpretation of § 924(e)(2)(B)(ii). In its *Taylor* briefing Respondent recognized that the four enumerated offenses in § 924(e)(2)(B)(ii)—and particularly extortion and burglary—were not offenses that necessarily posed a risk of physical injury. See Brief of United States, *Taylor*, 1989 WL 1126976, at *33 ("[T]he crime of extortion may be committed without any threat or risk of physical injury, yet the statutory language leaves no doubt that extortion of any type, including extortion by economic duress, is within the reach of Section 924(e)(2)(B)(ii). The same is true of burglary"). Respondent was correct in 1989 when it recognized that burglary could be committed "without any threat or risk of physical injury," and it is wrong now. *Id.* To hold that all completed burglaries "present[] a serious risk of physical injury" renders § 924(e)(2)(B)(ii)'s inclusion of the term "burglary" meaningless. See *id.* at 32-33. If all completed burglaries pose a serious potential risk of physical injury," then all burglaries would fit within the "otherwise" clause and Congress' specification of "burglary" would have been superfluous. See *Jackson*, 544 U.S. at 190. Moreover, burglary is not a crime that poses a "serious potential risk" of physical injury. On the contrary, burglaries "only rarely involve physical violence." *Tennessee* v. *Garner*, 471 U.S. 1, 21-22 (1985). As the *Garner* Court observed:

> The FBI classifies burglary as a "property" rather than a "violent" crime. Although the armed burglar would present a different situation, the fact that an unarmed suspect has broken into a dwelling at night does not automatically mean he is physically dangerous.... In fact, the available statistics demonstrate that burglaries only rarely involve physical violence. During the 10-

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(defining "potential" as "existing in possibility: having the capacity or a strong possibility for development into a state of actuality").

> year period from 1973-1982, only 3.8% of all burglaries involved violent crime.

Id. (internal citations omitted).[7] Indeed, while Congress' original inclusion of burglary in the ACCA was due in part to its concern about the potential for violence, an equal (and arguably greater) concern was its belief that "'[m]ost ... burglaries are committed by career criminals.'" H.R. Rep. No. 98-1073, at 3 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3361, 3663; see also Pet. Br. 26 n.20.

Moreover, it cannot be said that attempted burglaries present the same risk as burglaries. Any risk presented by burglary arises from illegal *entry* into a structure; absent entry, there is no "'serious potential risk of physical injury.'" *Taylor*, 495 U.S. at 589. Respondent concedes as much in noting that "'[t]he fact that an offender *enters a building* to commit a crime often *creates the possibility* of a violent confrontation.'" Resp. Br. 14 (emphasis added). Attempted burglaries cannot, therefore, "by their very nature" create a "serious potential risk of physical injury," since attempted burglary by definition does not include illegal entry. See Fla. Stat. § 777.04(1) (providing that attempt crimes require that defendant "fails" in the attempted crime or "is intercepted" before the crime can be completed); *Richardson* v. *State*, 922 So. 2d 331, 333-34 (Fla. 4th Dist. Ct. App. 2006) (reversing attempted burglary conviction where "the evidence could establish only the completed crime of burglary").

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[7] Dicta in *Leocal* v. *Ashcroft*, 543 U.S. 1, 10 (2004), indicating that burglary is a crime of violence under 18 U.S.C. § 16(b) does not contradict the *Garner* Court's recognition that burglary ordinarily does not involve violence to persons. Section 16(b)'s definition of "crime of violence" applies to crimes that "involve[] a substantial risk that physical force against the person *or property* of another may be used in the course of committing the offense." § 16(b) (emphasis added). While physical force against property is certainly used in most burglaries, physical force against persons is relatively rare. *See Garner*, 471 U.S. at 21-22.

Under Respondent's theory, § 924(e)(2)(B)(ii) would encompass many property crimes that are not inherently violent, on the assumption that discovery of the crime could lead to "a violent encounter" between the criminal and those who might wish to defend their property. Resp. Br. 28 (arguing that the "risk" posed by "attempted burglary" is the risk "that a violent encounter will occur"); *id.* 29 (asserting that burglary carries risk that "the perpetrator's conduct in seeking entry to commit a burglary will *provoke* violence" (emphasis added)).[8] But on this logic nearly any felony could qualify, for the discovery of a felony almost always could lead to a confrontation between the felon and the discoverer. A defendant who commits grand theft by shoplifting a watch creates a possibility of confrontation between the shoplifter and the shopowner—indeed, since the shoplifter would necessarily be *inside* the store at the time, the "risk" of confrontation created by his crime would be greater than the "risk" created by an attempted burglar who failed to enter the store. See Fla. Stat. § 812.014(2)(c)(1) (defining grand theft as theft of property "[v]alued at $300 or more"). An identical risk of potential confrontation could be created by a defendant who writes a check for insufficient funds of $150 or more. See Fla. Stat. § 832.05(2)(b) (defining a worthless check offense as a felony when it involves $150 or more). It is absurd to think that the concluding phrase of Congress' detailed definition of "violent felony" has such an expansive

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[8] Respondent cites no empirical evidence that attempted burglary creates a serious potential risk of physical injury. Instead, Respondent offers only anecdotal evidence—three cases from other jurisdictions in which a defendant was convicted of both attempted burglary and *other* violent crimes. *See* Resp. Br. 20 n.5; *see also United States* v. *Hargrove*, 416 F.3d 486, 494 (6th Cir. 2005) ("it is the government's burden to prove that a defendant qualifies for the mandatory 15-year ACCA enhancement").

scope as to sweep in such fundamentally nonviolent felonies on the theory that they create a risk of violence if discovered.[9]

III. RESPONDENT MISUNDERSTANDS FLORIDA LAW OF ATTEMPTED BURGLARY.

Respondent's claim that Florida law "appears to require more than the Model Penal Code standard" to prove attempted burglary is utterly meritless. Resp. Br. 25. In fact, Florida law allows convictions in a wider array of circumstances than does the Model Penal Code. See Fla. Stat. § 777.04(1) ("[a] person who attempts to commit an offense prohibited by law and in such attempt does *any act* toward the commission of such offense, but fails in the perpetration or is intercepted or prevented in the execution thereof, commits the offense of criminal attempt") (emphasis added). Respondent does not (and cannot) contest that Petitioner has accurately characterized Florida's standards for attempt. See Pet. Br. 24-26 & nn. 15-19. Nor can it dispute that the Eleventh Circuit has recognized that Florida's attempt statute is significantly *less* rigorous than the Model Penal Code "substantial step" standard. See *United States* v. *Wade*, 458 F.3d 1273, 1278 (11th Cir. 2006).

Instead, Respondent relies upon a single Florida case—*Jones* v. *State*, 608 So. 2d 797 (Fla. 1992)—to argue that Florida's standard for criminal attempt is not broad in the specific context of attempted burglary. *Jones* relied on *Thomas* v. *State*, 531 So. 2d 708, 709 (Fla. 1988), where a defendant was convicted of possession of burglary tools, but not of attempted burglary. The *Jones* court reasoned that

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[9] Courts accepting Respondent's "confrontation" logic have concluded that even felonies as nonviolent as failing to report to county jail are violent felonies for ACCA purposes. *See, e.g.*, *United States* v. *Golden*, No. 06-1326, 2006 WL 3019464, at *2-3 (7th Cir. Oct. 25, 2006) (holding that two state convictions for failure to report to jail were violent felonies under the "otherwise" clause because police's attempts to arrest the nonreporter might create "the potential for a violent confrontation").

"[the *Thomas* defendant] could not have been convicted of attempted burglary because there had been no overt act directed toward entering or remaining in a structure or conveyance." *Jones*, 608 So. 2d at 799. Respondent mistakenly interprets these words to mean that because the defendant did not arrive at the threshold of the dwelling, he could not be convicted of attempted burglary. Resp. Br. 22-23. But the lack of an act bringing the defendant to the threshold of the property was not, itself, dispositive. Rather, attempted burglary was precluded in *Thomas* because it could not be determined with any specificity which of several nearby dwellings the defendant may have targeted. See *In the Interest of M.M.*, 571 So. 2d 112, 112-13 (Fla. 4th Dist. Ct. App. 1990) (holding that failure to plead and prove ownership is fatal to the state's case in burglary and attempted burglary cases); Florida Standard Jury Instructions in Criminal Cases, Burglary and Trespass (3d ed. 1981) (requiring a jury to find that the defendant "did not have the permission or consent of [person alleged in the indictment or information] ... to [enter][remain in] the [structure] [conveyance] at the time") (second through fifth alteration in original).

Using this mistaken conclusion regarding *Jones*, Respondent attempts to support its reading of Florida law by relying on a Florida evidentiary statute declaring that "[i]n a trial on the charge of attempted burglary, proof of the attempt to enter such structure or conveyance at any time stealthily and without the consent of the owner or occupant thereof is prima facie evidence of attempting to enter *with intent to commit an offense*." Fla. Stat. § 810.07(2) (emphasis added). This statute, however, does not relate to the "overt act" requirement for criminal attempt.[10] The fact that being caught

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[10] In addressing § 810.07, the Florida Supreme Court has made it clear that "[s]tealth is not an element of burglary. Stealthy entry, together with the absence of owner or occupant consent, is an evidentiary tool with

while trying to sneak into a structure or its curtilage can be used as evidence of an intent to commit an offense therein in no way means that such evidence is necessary to prove the "overt act" required for an offense. On the contrary, attempted burglary can be proven in the same way as other attempts: by proving any act taken toward the commission of an offense.[11]

IV. FLORIDA'S DEFINITION OF BURGLARY TO INCLUDE CURTILAGE FURTHER UNDERCUTS RESPONDENT'S ARGUMENTS.

By treating mere entry onto the curtilage of a structure as a burglary of that structure, Florida's burglary statute punishes acts that would not be crimes under *Taylor's* generic definition of burglary. Compare *Taylor*, 495 U.S. at 599 (defining generic burglary as crimes "having the basic elements of unlawful or unprivileged entry into, or remaining in, *a building or structure*" (emphasis added)), with *State* v. *Hamilton*, 660 So. 2d 1038, 1041 (Fla. 1995) (extending burglary to entries onto curtilage). Respondent contends that "Florida's treatment of curtilage does not undercut the court of appeals' conclusion that attempted burglary of a dwelling under Florida law categorically presents a serious potential

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which to establish prima facie proof of intent to commit an offense." *Baker* v. *State*, 636 So. 2d 1342, 1344 (Fla. 1994).

[11] A defendant who professed an intention to burgle an office building to an undercover officer could be arrested for attempted burglary when he arrived at the location at the pre-arranged time—the police would not need to wait until he actually attempted to enter the building. *See Mercer* v. *State*, 347 So. 2d 733, 735 (Fla. 4th Dist. Ct. App. 1977). A defendant could similarly be convicted if he broke off the attempt before crossing the curtilage upon sighting a security guard. *See Webber* v. *State*, 718 So. 2d 258, 259 (Fla. 5th Dist. Ct. App. 1998) ("[t]he overt act [was defendant's] arrival at or in the vicinity of the gas station, shortly after the appointed time, with the credit cards in his possession").

risk of injury to another." Resp. Br. 38.[12] This contention relies on Florida's supposedly "narrow[]" definition of curtilage, *id.* at 41 n.18, which requires the presence of a surrounding enclosure. Respondent hypothesizes that a resident will defend their enclosed curtilage "in the same manner that he would protect the dwelling itself." *Id.* at 40. Common sense dictates otherwise. Stealing an apple from a neighbor's backyard, which is "a burglary under Florida's statute," *United States* v. *Plunta*, 144 F.3d 968, 975-76 (6th Cir. 1998), simply does not raise the same concerns of a violent confrontation as a forced entry into a residence. Homes are unique. See William Blackstone, 4 *Commentaries* *223 ("the law of England has so particular and tender a regard to the immunity of a man's house, that it styles it his castle, and will never suffer it to be violated with impunity").

Respondent's appeal to Fourth Amendment principles is equally unavailing. Although an individual may have an expectation of privacy in their curtilage, no one could reasonably say that an individual would not have a heightened expectation of privacy in his or her home. It does not stand to reason that the violation of any expectation of privacy will likely be met with violent resistance. Therefore, it is fallacious to contend that "the likelihood of a confrontation between the burglar and a resident [is] no less applicable to the dwelling's curtilage than to the dwelling itself." Resp. Br. 41. Moreover, the Fourth Amendment has no applicability here. The "reasonable expectation of privacy" standard applies in the context of warrantless *government* intrusion.

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[12] It is worth noting that the Eleventh Circuit did not hesitate to hold that—regardless of whether the curtilage provisions of Florida burglary convictions make it a non-generic burglary—all such burglaries categorically pose a "serious potential risk of physical injury to another." *United States* v. *Matthews*, No. 05-13447, 2006 WL 2884040, at *3 (11th Cir. Oct. 12, 2006). By sweeping non-generic burglaries into the "otherwise" clause on the theory that they pose the same risks as a completed generic burglary, the Eleventh Circuit's expansive definition of the "otherwise" clause robs *Taylor* of any significance.

See *Katz* v. *United States*, 389 U.S. 347, 360-61 (1967) (Harlan, J., concurring). Even if the Fourth Amendment analogy were appropriate, it would only support Petitioner's claim that an illegal entry into a home presents a greater potential risk of physical injury than a curtilage intrusion.[13] Accordingly, under Respondent's own logic the likelihood of defense would have to be greater in the context of a private home than the curtilage of that home.

V. RESPONDENT'S INTERPRETATION OF THE ARMED CAREER CRIMINAL ACT RAISES SERIOUS CONSTITUTIONAL QUESTIONS.

Even if Respondent's interpretation of § 924(e)(2)(B)(ii) were persuasive (and it is not), it raises serious constitutional concerns and should be rejected for that independent reason. Respondent claims that the "serious potential risk of physical injury" provision of the ACCA permits this element to be found by courts based on nothing more than the courts' "*commonsense judgments* based on *everyday experience* and cases that come before them." Resp. Br. 43 (emphasis added). Unfazed by the vagueness of this standard, Respondent asserts that Congress "left it to the courts" to define what sorts of offenses will fit within the "otherwise" clause. *Id.* at 42. Such a construction raises two serious constitutional questions. First, Respondent's proposal that courts use their "common[ ]sense" and "everyday experience" to define whether an offense poses a serious potential risk of physical injury to another calls for unadulterated judicial factfinding. Whether or not particular conduct is risky is *not* "a quintessential legal determination." Resp. Br. 42-43. It is rather a factual determination that requires a careful

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[13] An individual's expectation of privacy is at its peak in his or her home. *See Kyllo* v. *United States*, 533 U.S. 27, 34 (2001) (distinguishing expectation of privacy for interior of home from that for "curtilage and uncovered portions of residences"); *see also Payton* v. *New York*, 445 U.S. 573, 590 (1980) ("[T]he Fourth Amendment has drawn a firm line at the entrance to the house").

assessment of the surrounding circumstances. Cf. *Dunbar* v. *Jackson Hole Mountain Resort Corp.*, 392 F.3d 1145, 1149 (10th Cir. 2004) ("'whether something is or is not an inherent risk is a factual question that must be sent to the jury for determination'"). Courts are completely unequipped to make such factual determinations—particularly when they involve the "risk" posed by unfamiliar state law crimes. Cf. *United States* v. *Golden*, No. 06-1326, 2006 WL 3019464, at *3-4 (7th Cir. Oct. 25, 2006) (Rovner, J. concurring) (noting lack of any record evidence to support court's conclusions about "actual risks" posed by predicate felony). Moreover, these type of facts are "too far removed from the conclusive significance of a prior judicial record," and more akin to the findings subject to *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000). *Shepard*, 544 U.S. at 25.

Respondent is certainly correct that the Eleventh Circuit did not "assess[] the facts specific to petitioner's prior conviction," Resp. Br. 42.[14] It did something far worse; it

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[14] Respondent's suggestion that the Eleventh Circuit could consider the presentence report to determine whether Respondent's conviction was sufficiently risky is inappropriate. Neither the District Court nor the Eleventh Circuit used a presentence report to make such a factual assessment. Moreover, Petitioner did object to the use of the attempted burglary conviction for enhancement purposes, JA 21, and that objection fully preserves his right to contest Respondent's proposal to rely on the assertions in the presentence report to prove the supposed "risk" of his actions. *See United States* v. *McCall*, 439 F.3d 967, 974 (8th Cir. 2006) (en banc).

Most importantly, "bureaucratically prepared, hearsay-riddled presentence reports," *United States* v. *Booker*, 543 U.S. 220, 304 (2005) (Scalia, J., dissenting in part), are a far cry from the documents that *Shepard* allows to be considered to establish "the conclusive significance of a prior judicial record." *Shepard*, 544 U.S. at 25. A presentence report standing alone, without any evidence that its information derived from *Shepard*-appropriate document, is wholly insufficient to establish what facts were necessarily found when Respondent was convicted. *See McCall*, 439 F.3d 967, 974 (district court could not rely on presentence report that relied on sources not approved in *Taylor* or *Shepard*); *United*

assumed, based on no record at all, that Petitioner's conviction must have created a serious potential risk of physical injury to another. The fact that the Eleventh Circuit based this factual determination on its "common[ ]sense" rather than a developed record only exacerbates the constitutional difficulties posed by Respondent's interpretation of the statute.[15]

There is a reasonable, constitutional reading of the "otherwise" clause—that it encompasses offenses with an element requiring a serious potential risk of physical injury to another (such as reckless endangerment). See, *e.g.*, Ala. Code § 13A-6-24(a) (reckless endangerment requires finding of "conduct which creates a substantial risk of serious physical injury to another person."); Alaska Stat. § 11.41.250(a) (same); N.Y. Penal Law § 120.20 (same); Ariz. Rev. Stat. § 13-1201 (same).[16] Such an element-based reading of the

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States v. *Taylor*, 413 F.3d 1146, 1157-58 (10th Cir. 2005) (holding that presentence report that relied on police reports was not sufficiently reliable under *Shepard*).

[15] A second serious constitutional question is raised by Respondent's suggestion that Congress simply "left it to the courts" to define what offenses would qualify under the "otherwise" clause. Resp. Br. 42. Congress must define the elements of offenses and may not simply delegate the responsibility for defining the element of a crime to the courts. *See Mistretta* v. *United States*, 488 U.S. 361, 404 (1989).

[16] *See, e.g.*, 18 U.S.C. § 2332b(a)(1)(B) (defining "terrorist act" as conduct that, *inter alia*, "creates a substantial risk of serious bodily injury to any other person"); Alaska Stat. § 11.61.150(a)(1) (defining crime of obstruction of highways to require proof of "a substantial risk of physical injury to others using the highway"); Ariz. Rev. Stat. § 13-2508 (defining "resisting arrest" as, *inter alia*, preventing an officer from effecting an arrest through "any ... means creating a substantial risk of causing physical injury to the peace officer or another"); Cal. Health & Safety Code § 42400.3.(b) (criminalizing air pollution "that results in any unreasonable risk of great bodily injury to, or death of, any person"); Fla. Stat. § 1006.135(3) (defining hazing to require proof of "a substantial risk of physical injury or death to such other person"); N.Y. Penal Law § 145.45 (tampering with a consumer product in the first degree requires proof of "a

"otherwise" clause is consistent with the remainder of the statute and gives full effect to Congress' words.

If any doubt remains about whether attempted burglary convictions are predicate felonies under § 924(e)(2)(B)(ii), the rule of lenity requires such doubt to be resolved in favor of Petitioner. Under the rule of lenity, § 924(e)(2)(B)(ii) must be given its narrowest, most reasonable reading. *United States* v. *Lanier*, 520 U.S. 259, 266 (1997). Even if there were any merit to Respondent's novel claim that judges may use their "experience" to decide which crimes are sufficiently risky to qualify under § 924(e)(2)(B)(ii) (and there is not), that interpretation is far less reasonable than the interpretation urged by Petitioner—that § 924(e)(2)(B)(ii) should be construed in accordance with fundamental canons of construction, and construed to avoid the serious constitutional questions presented by interpreting § 924(e)(2)(B)(ii) as a congressional delegation of authority for judges to make legislative determinations about what crimes pose what risks. Moreover, Respondent's position prevents the "fair warning" required of criminal statutes, as a person could only guess as to the type of offenses covered by an individual judge's use of her common sense and everyday experience. *Lanier*, 520 U.S. at 267. Accordingly, Petitioner's narrower interpretation must be adopted here.

CONCLUSION

For the foregoing reasons, the judgment of the Eleventh Circuit should be reversed.

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substantial risk of serious physical injury to one or more persons'); *id.* § 490.47 ("criminal use of a chemical weapon or biological weapon" requires proof of "a grave risk of death or serious physical injury to another person not a participant in the crime").

Respectfully Submitted,

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